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THE
PRACTICE
OF THE
Court of King's Bench
IN PERSONAL ACTIONS.

PART II.

By WILLIAM TIDD,
Of the INNER TEMPLE.

LONDON:

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ADVERTISEMENT.

HAVING already treated, in the first part, of the various modes of commencing a suit, by *original writ*, *attachment* of privilege, or *bill* in trespass, &c. and of proceeding therein, from its commencement, to the demand of a plea, together with all that is peculiar to the proceedings by or against *attornies*, and other *officers* of the court, against *peers* of the realm and *members* of the house of commons, upon the writ of *habeas corpus*, and against *prisoners* in the actual custody of the marshal or sheriff, &c. the author has, in this second part, continued down the proceedings at large, from the demand of a plea, to final judgment and execution.

The plan upon which he originally set out, and to which he has attended in the progress of the work, has been, to reduce the practice of the court of King's-Bench to something like a methodical system, by pursuing the natural order of the proceedings, and by collecting and digesting, as he went along, every thing that seemed to have any relation to the subject he was treating of. In the prosecution of this plan, he has occasionally considered, as parts of one general whole, not only
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the proceedings in ordinary cases, but also such as more rarely occur, and were either never before treated of, or have hitherto been considered as detached heads. In particular, the reader will find, in this part of the work, some account of the practice on *motions*; the cases in which the court will *set aside* or *stay* the proceedings; the doctrine of *pleas* and *pleading*, and of *demurrers*, *amendments*, and *jeofails*; the subject of *arbitration*; the proceedings on *trials at bar* or *nisi prius*; and the law of *damages* and *costs*. To the whole is subjoined a copious *index*, by way of *analysis*, shewing at one view the connection and order of the different proceedings.

All that remains, in the third part, is to treat of the means of reversing a judgment by *writ of error*, and of reviving it by *scire facias*; with the proceedings in *replevin* and *ejectment*, &c. To which an *appendix* will be added, of practical forms, applicable to, and illustrative of what is advanced in the body of the work.

Inner Temple,
Nov. 1, 1794.

DIRECTIONS to the BIN

DER.

TO cancel the old Table of Contents and Principal Matters, together with the *Errata*; to bind the whole Work in one large Volume, or two smaller ones, beginning the second at p. 417; and to place the new Table of Contents after the Preface in Part I. the new Title-page and Advertisement at the Beginning of Part II. or if there are two Volumes, at the Beginning of Vol. II. and the new Index, *Addenda*, &c. at the End.

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C H A P. XXI.

Of setting aside, and staying Proceedings.

IN the defence of an action, one of the first things to be attended to, on the part of the defendant, is the regularity of the proceedings; for if they are irregular, the court on motion will set them aside.

A motion is an application, by counsel, for a rule or order of the court; and it is either for a rule absolute in the first instance, which is sometimes moved for in court, and sometimes drawn up on a motion paper signed by counsel, and delivered to the clerk of the rules; or it is only for a rule to shew cause, or as it is commonly called a rule *nisi*, or unless cause be shewn to the contrary, which is afterwards moved to be made absolute.

Motions are of a civil or criminal nature. Of the latter kind is the motion for an attachment, which may be moved for on account of contemptuous words, spoken of the
S court,

court, (A.^a) or its process; (N.) for a rescue, (N.) or disobedience to a *subpoena*, (N.) or other process; (N.) against the sheriff, for not returning the writ, (A.) or bringing in the body; (A.) against an attorney, for not performing his undertaking, (N.) or otherwise misbehaving himself; (N.) and against other persons, for non-payment of costs^b, (A.) or not performing an award, &c. (N.) An attachment for misbehaviour is commonly preceded by a motion for a rule to answer the matters of the affidavit; and the party, being taken on the attachment, either remains in custody, or puts in bail before a judge, (for he is not bailable by the sheriff^c), to answer interrogatories, to be exhibited against him^d; which interrogatories must

^a In classing the different motions, the letter (A.) is used to denote that the rule is *absolute* in the first instance; the letters (A. S.) that it is drawn up on the *signature* of counsel; the letters (A. C.) that it cannot be had without *consent*; and the letter (N.) that, in the first instance, it is only a rule *nisi*.

^b The rule for an attachment for non-payment of costs, on the master's *allocatur*, is absolute in the first instance; but where it is for the non-payment of money generally, it is only a rule to shew cause. By *Buller*, Justice, M. 24 G. 3.

^c 1 Str. 479.

^d 7 Mod. 31. 6 Mod. 43.
1 Str. 444. 4 Burr. 2106,
2129.

be signed by counsel^e, and if judgment be not given the same term, the name of the cause should be inserted in the list of motions, appointed to come on peremptorily in the ensuing term^f.

Motions of a civil nature are made on behalf of the plaintiff, or of the defendant. On behalf of the plaintiff, they are either for something to be done, in the common and ordinary course of the suit, as to increase issues, (A.) for a *concilium*, (A. S.) or judgment, (A.) on demurrer, special verdict, or a writ of error; for leave to enter up judgment on an old warrant of attorney, (A.) or *nunc pro tunc*; (N.) to enter up judgment and take out execution, after an award, where a verdict has been taken for the plaintiff's security, (N.) or after a verdict for the plaintiff, against one of several under-writers, where the rest have agreed to be bound by it; (N.) or to take out execution pending a writ of error, &c.: (N.) to amend the pleadings, or other proceedings in the course of the suit; (N.) or to set aside a judgment of *non pros*, (N.) non-suit, (N.) verdict, (N.) or inquisition: (N.) or they are for something to be done, out of the common and or-

^e R. M. 34 G. 3. 5
T. R. 474.

^f R. H. 34 G. 3. 5 T.
R. 547.

dinary course of the suit, as for the defendant to abide by his plea, (A. S.) to refer it to the master to assess the damages, without a writ of inquiry, (N.) for the execution of a writ of inquiry before a judge, (N.) or to have a good jury upon the execution of such writ; (A.) for a trial at bar, (N.) or in an adjoining county; (N.) for a view^s, (A. S.) or special jury; (A. S.) to have witnesses examined on interrogatories; (A. C.) or for leave to inspect and take copies of books, court rolls, &c. (N.) or to have them produced at the trial. (N.)

On behalf of the defendant, motions may be considered as they arise, and succeed one another, in the course of the suit. Before declaration, they are to quash the writ, (N.) justify bail, (A.) reverse an outlawry, (N.) or, after several rules for time to declare, that the plaintiff declare peremptorily. (A.) After declaration, they are to set aside an interlocutory judgment, for irregularity, (N.) as being signed contrary to good faith, (N.) or upon an affidavit of merits; (N.) to set aside or

^s In trespass, the rule for a view is drawn up on a motion paper signed by counsel; but in other ac-

tions, it is moved for in court, and in some cases is only a rule to shew cause.

stay

stay proceedings, in actions upon bail bonds, or in other actions, if irregular or unfounded, (N.) and if the defendant is a prisoner, to discharge him out of custody, upon common bail, (N.) or if the proceedings are regular, to stay them upon terms; (N.) to compound penal actions, (A. C.) change the venue, (A.) consolidate actions, (N.) or strike out superfluous counts; (N.) for time to plead, or reply, &c. under special circumstances; (N.) to plead several matters, (A. S.) or pay money into court; (A. S.) to withdraw the general issue, and plead it *de novo*, with a notice of set-off, (A.) or upon paying money into court; (A.) to add or withdraw special pleas; (A.^h) to pay the issue money into court, in a *qui tam* action; (N.) to put off a trial, if the defendant is not ready, (N.) or if the plaintiff will not proceed, for costs for not proceeding to trial, (A.) or inquiry, (A.) or for judgment as in case of a non-suit; (N.) in arrest of judgment, (N.) or for a suggestion, after verdict, to intitle the defendant to costs; (N.) to set aside an execution, and discharge the defendant, or re-

^h In the three last cases, instance, is sometimes on the rule, though commonly absolute in the first instance, is sometimes only to shew cause.

store to him the money levied, or to retain it in the sheriff's hands. (N.)

The defendant also, as well as the plaintiff, may move for a *concilium*, (A. S.) or judgment, (A.) on demurrer, special verdict, or a writ of error; to amend; (N.) for a trial at bar, (N.) or in an adjoining county; (N.) for a view, (A. S.) or special jury; (A. S.) to have witnesses examined on interrogatories, (A. C.) or for leave to inspect and take copies of books, court rolls, &c. (N.) or have them produced at the trial; (N.) or to set aside a verdict, (N.) or inquisition. (N.) Either party may likewise move to make a judge's order, submission to arbitration, or order of *nisi prius*, a rule of court; (A.) to enlarge the time for making an award, (A. C.) to set aside an award, (N.) or judge's order; (N.) or for the master to make his report, (A.) or review his taxation. (N.)

There are some motions peculiar to the action of ejectment, such as for judgment against the casual ejectorⁱ, (A. S.) or that

ⁱ Where there is any thing in the service of the declaration, out of the common way, it should be mentioned to the court; and where the affidavit of service is defective, they will give leave to file a supplemental affidavit.

service

service on the tenant's son or daughter, &c. may be deemed good service; (N.) for the landlord to be admitted defendant, instead of the tenant, (A. S.) or for leave to take out execution, in such case, against the casual ejector, after the landlord has failed in his defence. (N.) And there are other motions, not necessarily connected with any action, as to set aside an annuity, (N.) and deliver up the securities to be cancelled, &c.

An attachment for non-payment of costs, and against the sheriff for not returning the writ, may be moved for the last day of term ^k. But a motion to answer the matters of an affidavit cannot be made on that day ^l; or any motion which would operate as a stay of proceedings, unless it appear to the court that, under the circumstances, it could not have been made earlier: and Mr. Justice *Twisden* used to cite the book of Edw. 4. and say, they were to hear no law the last day of term ^m.

A motion is in general accompanied with an affidavit, and sometimes preceded by a notice. The affidavit should be properly in-

^k 1 Bur. 651. 5 Bur. 2686.

^l 4 Bur. 2502.

^m 2 Salk. 624.

titledⁿ and contain a full statement of all the circumstances necessary to support the application; and the rather, as it is a rule not to receive any supplementary affidavit on shewing cause. Motions and affidavits for attachments, in civil suits, are proceedings on the civil side of the court, until the attachments issue, and are to be intitled with the names of the parties^o: but as soon as the attachments issue, the proceedings are on the crown side, and from that time the king is to be named as the prosecutor^p. And where a submission to an award is made a rule of court, under the statute, there being no action, the affidavits on which to apply for an attachment, for disobeying the award, need not be entitled in any cause; but the affidavits in answer must^q. An affidavit sworn before the attorney in the cause cannot be read^r, except for the purpose of holding the defendant to special bail^s. And where an affidavit is made, before a commissioner, by a person who from his signature appears to be illiterate, the commissioner taking the affidavit shall certify, or state in the *jurat*, that it was read in his pre-

ⁿ 2 T. R. 644.^o 3 T. R. 253.^p Id. 3 T. R. 133.^q 3 T. R. 601.^r Id. 403.^s Ante, 39.

fence,

fence, to the party making the same, who seemed perfectly to understand it, and wrote his signature in the presence of the commissioner^t. The notice of motion, though seldom necessary^u, is frequently given, in order to save time and expence, by affording the adverse party an opportunity of shewing cause in the first instance, or by inducing the court to disallow the costs of proceedings, taken after the notice, and before the motion.

The rule to shew cause is drawn up for a particular day in term; previous to which it should be duly served. To bring a party into contempt, a copy of the rule must be *personally* served, and the original at the same time shewn to him^v: in other cases, the same degree of strictness is not required in the service of the rule, but it is sufficient, without shewing the original, to leave a copy of it with any person representing the party, at, his dwelling-house or place of abode. And when a rule is obtained, to set

^t R. E. 31 G. 3. 4 T. R. 284.

^u The Statute 14 G. 2. c. 17. requires notice of motion, for judgment as in case of a non-suit; but, in

this court, the rule to shew cause is deemed a sufficient notice. Lofft, 65. *Aliter* in C. B. H. Blac. 1. v. 527.

^v 3 T. R. 351.

aside proceedings for irregularity, and to stay proceedings in the mean time, the proceedings are suspended for all purposes, till the rule is discharged^w; therefore where the plaintiff took an assignment of the bail bond, pending a rule to shew cause, why it should not be given up to be cancelled, on the defendant's filing common bail, the court set aside the assignment, as having been made too soon.

On the day appointed for that purpose, the counsel for the party called upon by the rule may shew cause against it, either upon or without an affidavit, as circumstances require. But an office copy must be first taken of the rule, and of the affidavit upon which it was granted, or otherwise counsel cannot be heard. Previous to shewing cause, it is usual to deliver over the affidavit to the counsel for the rule, who has a right to make any objection arising on the face of it; and if a doubt arises, upon the statement of the facts contained in the affidavit, it is inspected by the judges, or read by the officer of the court. When an affidavit has been made use of, but not before, it may be filed; in order that, if it be not true, the party may be indicted for perjury.

^w 4 T. R. 176.

If cause be not shewn on the day appointed, the counsel for the party obtaining the rule may move, the next day, to make it absolute; which is done as a matter of course, if no cause be shewn, on an affidavit of service. But it frequently stands over, by consent of parties, or for the accommodation of counsel, till a subsequent day, when the counsel on either side may bring it on, by moving to make the rule absolute, or discharge it; though if not brought on, or enlarged, during the same term, it falls to the ground. When the counsel for the party obtaining the rule is not ready to support it, he may move to enlarge the rule till a future day in the same or the next term; which is pretty much of course, when it is in his own delay, but otherwise the court will not enlarge the rule without consent, or some evident necessity; and they will never enlarge the plaintiff's rule, when it would have the effect of continuing the defendant in custody. In like manner, when the counsel for the party called upon by the rule is not prepared to shew cause against it, he may apply to enlarge the rule, till a future day; which is a matter of right, if the rule was not served in time, so as to give the party an opportunity of answering it; but otherwise
the

the court may impose upon him what terms they think proper, and they commonly require him to file his affidavits, so as to give the adverse party an opportunity of inspecting them, previous to the day appointed for shewing cause. In cases of urgency, the court, towards the end of the term, will sometimes enlarge the rule till a day in the vacation, when it is to be brought on before a judge at chambers.

On shewing cause against the rule, the court either make it absolute, or discharge it; and that, either with or without the costs of the application, or such costs are directed to abide the event of the suit. When the proceedings are regular, and the application is made to the favor and indulgence of the court, the rule to shew cause is commonly made absolute, on payment of costs by the party applying: but when the proceedings are irregular, the rule to shew cause, why they should not be set aside, is generally drawn up with costs, to be paid by the opposite party; and if the rule be made absolute in that form, the party obtaining it is intitled, by the terms of the rule, to the payment of costs, which the master will tax, and if they are not paid on demand, the court on motion will
grant

grant an attachment. But though the rule be drawn up with costs, yet the court in some instances will make it absolute without costs, in which case each party pays his own; or they will direct the costs to abide the event of the suit, in which case the party ultimately succeeding is intitled to them. And whenever a rule is drawn up with costs, and the court do not mean the party should have them, they will mention it. If, upon shewing cause, it appears that there was no ground or foundation for the rule, the court will discharge it, with costs to be paid by the party applying; and whenever the rule is drawn up with costs, the court, if they discharge it, will discharge it with costs. But if there was any ground for the rule, and it is not drawn up with costs, the court will, in general, discharge it without costs; or they will sometimes order the costs to abide the event of the suit. And where nothing is said about costs in the rule, or by the court on making it absolute, or discharging it, they are considered as costs in the cause, and must be paid to the party ultimately succeeding, if the rule be made before judgment; but if it be not made till afterwards, they depend entirely on the rule, and if nothing be said therein concerning

cerning them, each party will have to pay his own costs.

In hearing motions, the course formerly was, to begin every day with the *senior* counsel within the bar, and then to call to the next *senior*, in order, and so on, as long as it was convenient to the court to sit; and to proceed again in the same manner, upon the next and every subsequent day, although the bar had not been half, or perhaps a quarter gone through, upon any one of the former days; so that the *juniors* were very often obliged to attend in vain, without being able to bring on their motions, for many successive days^x. This practice bearing hard upon *junior* counsel, Lord *Mansfield* introduced a different rule, which has ever since been adhered to, of going quite through the bar, even to the youngest counsel, before he would begin again with the *seniors*; even though it should happen to take up two or more days, before all the motions, which were ready at the bar upon the first day, could be heard^y.

Particular days are appointed for certain business, as *Tuesday* and *Friday*, which are called paper days, for going through the pa-

^x 1 Bur. 57.

^y Id. 58.

per of causes, wherein *conciliums* have been moved for, on the civil side; and *Wednesday* and *Saturday* for transacting business on the crown side. All motions or rules, in matters of length or consequence, are appointed for particular days, and called on first^z. Special causes are to be argued in the same order they are entered in the paper, and not to be entered anew, or put off, without a special application to the court^a; and all enlarged rules must come on, *peremptorily*, during the first week of the term^b. If a rule be made absolute, or discharged, by surprise, the court will open it; and if, by mistake, it be drawn up wrong, they will order it to be set right.

Analogous to these proceedings in court, is the practice, by summons and order, at a judge's chambers, of which something has been already said, in treating of the mode of obtaining further time to plead^c. This practice seems to have arisen, partly from the overflowing of the business of the court in term time, and partly from the necessity of certain proceedings being had in vacation, when the court is not sitting. And though

^z Pref. to Bur. V.

¹ Bur. 9. ³ Bur. 1842.

^a 1 Bur. 52.

^c Ante, 247.

^b Pref. to Bur. V.

extremely

extremely burthensome to the judges, it manifestly tends to the advantage of the suitor, the ease of the practitioner, and the general advancement of justice, by preventing the expence, trouble, and delay, which would ensue, if an application to the court were in all cases necessary. The order obtained upon a summons is however subject to an appeal, and the validity of it may be impeached two ways; either by moving the court to set it aside, or, if made in vacation, by applying, in the next term, to set aside the proceedings that have been had under it^d. But if the order be acquiesced under, it is as valid as any act of the court: and a judge's order for a prisoner's discharge, under the Lords' act, made out of term, has been held to be final. Indeed, if it become necessary to enforce the order by attachment, there must be a previous motion to make it a rule of court^e. But to return to the motion for setting aside proceedings for irregularity.

^d 4 Bur. 2569.

^e Doug. 68. N. B. In referring to *Douglas's Reports*, I have attended to the paging of the second

folio edition, which is preserved in the last or *octavo* edition.

^f 4 Bur. 2569.

An irregularity may be defined to be the want of adherence to some prescribed ~~rule~~ or mode of proceeding; and it consists, either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time, or improper manner. Thus, the want of notice is an irregularity, whether it be to process, upon a declaration, or of trial or inquiry; so, if the notice be not given in due time, or a proper manner. An interlocutory judgment, for want of a plea, is irregular, when it is signed either before the time for pleading is expired, or after a plea has been properly pleaded. And, in general, it may be remarked, that whenever the proceedings are irregular, the court on motion will set them aside, provided the application for that purpose be made in the first instance; for in all cases of irregularity, the party should apply to the court as early as possible, and if he either proceed himself, after discovering the irregularity, or lies by and suffers the other party to proceed, the court will not assist him.

* 3 T. R. 7, 10. 5 T. R. 254, 464.

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Though

Though the proceedings are regular, yet it sometimes happens that they are ill founded; as when the cause of action is frivolous, or the action brought, or conducted, upon bad or defective grounds, contrary to good faith, or without proper authority. And in such cases, the court on motion will order the proceedings to be stayed, with or without costs, according to circumstances.

When the debt sued for appears, on the face of the declaration, to be under 40*s.* the court on motion will stay the proceedings^b; it being below their dignity, to proceed in such an action. But when the plaintiff demanded more, the court would not formerly permit an affidavit to be read, that the defendant owed him lessⁱ. In a late case however, where it appeared by affidavit, that the plaintiff's attorney had admitted the debt sued for to be under 40*s.* the court made a rule for staying the proceedings^j. So where a cause has been removed from an inferior court, this court will grant a *procedendo*, if the debt or damages appear to be under 40*s.*^k.

^b 3 Bur. 1592.

^k Brownl. *Brev. Jud.*

ⁱ Say. Rep. 219, 240.

140. 2 Brownl. 82. Moyle,

3 Bur. 1592.

69. Clift, 374.

^j 4 T. R. 495.

But the court refused to quash a *certiorari*, upon this ground, in an action for an assault brought against excise officers, who could not have an impartial trial in the inferior court¹. And where a defendant, living within the jurisdiction of the court of requests for *Westminster*, was sued in this court for a debt under 40s. and neglected to take advantage of the statute 23 Geo. 2. c. 27. by pleading it in bar, the court would not, after verdict for the plaintiff, either suffer a suggestion to be entered on the record, that the defendant lived within the jurisdiction, or stay the proceedings^m.

In a penal action, on the 25 Ed. 3. st. 4. c. 3. where the application was made in an early stage of the cause, the proceedings were stayed on motion; because no affidavit had been filed, that the offence was committed within the county where the action was brought, or within a year before the bringing of it, according to the 21 Jac. 1. c. 4ⁿ. But, in a subsequent case, where the application was not made till after verdict, the court would not stay the proceedings, on a similar ground, in a penal action on the 21 Hen. 8. c. 13. § 26. for non-residence^o. And, in the

¹ 4 T. R. 499.

^o 3 T. R. 362. and see

^m 3 T. R. 452.

² Str. 1081.

ⁿ 2 T. R. 274.

latter case, it was holden, that the stat. 21 Jac. 1. c. 4. does not control any of those statutes, on which penal actions are to be brought in the superior courts; but only applies to those, on which proceedings may, and ought to be had before justices of assize, justices of the peace, &c.

In an action for bribery, on the 2 Geo. 2. c. 24. the court will stay the proceedings, even after verdict, upon the clause of discovery^p, or if the action be not prosecuted without wilful delay^q. And the proceedings have been stayed in an action on the 18 Geo. 2. c. 34. § 1. for keeping a gaming house; because, by a previous statute^r, the penalty is payable on conviction, before a justice of the peace. Also, by the 26 Geo. 3. c. 77. § 13. "If any
" action be commenced or prosecuted, for
" the recovery of any penalty or forfeiture, by
" virtue of any act, relating to the customs or
" excise, unless the same be commenced and
" prosecuted in the name of the attorney ge-
" neral, or some officer of the said revenues,
" the same, and all proceedings therein, are
" declared to be null and void; and the court
" shall not permit or suffer any proceedings
" to be had thereupon."

^p 4 Burr. 2287. ^q 3 T. R. 5. ^r 12 Geo. 2. c. 28. s. 1.

But in a *qui tam* action for insuring lottery tickets, contrary to the 16 Geo. 3. c. 34. the court would not stay the proceedings, upon an affidavit of the defendant, that a former action had been brought against him, in the common pleas, for the same offence, in which he had leave to compound; but said, he must plead such matter specially^a. And the court would not stay the proceedings, in an action against a sheriff's officer, on the 32 Geo. 2. c. 28. § 12. though a similar action had been commenced against the sheriff, for the same offence^b: though where actions had been brought against both, and a verdict obtained in each, the court stayed the proceedings, on payment of one penalty, and the costs in both actions^c.

When an action is brought pending a reference, or otherwise contrary to good faith, the court will not suffer the plaintiff to proceed in it; and they will stay the proceedings, when the action is brought by an attorney, without proper authority; for otherwise the defendant might be twice charged^d. So where an action was brought against an agent for prize money, the court set aside the pro-

^a Cowp. 744.

T R. 712.

^b 2 T. R. 512.

^c 1 T. R. 62.

ceedings, with costs to be paid by the attorney; because the letter of attorney from the plaintiff, to receive the prize money, was not duly attested, pursuant to the 20 Geo. 2. c. 24. §. 6^w.

There are some distinctions, deserving notice, between a mere irregularity, and a complete defect in the proceedings; the former may be waived by the adverse party, but not the latter^x: for a mere irregularity, the court will only set aside the proceedings that are irregular, leaving the plaintiff at liberty to continue his suit from the last regular proceeding; but for a complete defect, the proceedings are stayed *in toto*: on setting aside proceedings for irregularity, the party complained of is always liable to the payment of costs^y; but on staying them as defective, the costs are in the discretion of the court.

There are other grounds of staying the proceedings; not absolutely, but for a time, or until something be done for the benefit of the defendant. These are, pending a writ of error; until security be given for the pay-

^w *O'Hara v. Innes*, M.

27 G. 3. K. B.

^x 5 T. R. 254.

^y *Caf. temp. Hardw.*

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ment of costs; or until the costs are paid, of a former action for the same cause.

A writ of error is a supersedeas of execution from the time of its allowance^z, provided bail, when requisite, be put in thereon in due time^a. But it does not prevent the plaintiff from proceeding by action of debt, or *scire facias* on the judgment, against the principal, or by *scire facias*, or action of debt on the recognizance, against the bail. In such cases however, if the writ of error be not evidently brought for the mere purpose of delay, the court will stay the proceedings upon terms, pending the writ of error^b. But this is not a matter of course^c; and if it be apparent to the court, that the writ of error is brought merely for delay, they will not stay the proceedings^d. How that is to be made out, depends upon the circumstances of each particular case. In general, the court require it to be proved by an acknowledgment from the party who sues out the writ of error^e; and they have held that the *belief* of the other

^z 1 Salk. 321. 1 Bur. Cowp. 72. 3 T. R. 78.
^a 2 Str. 781. 1 T. R. ^c 2 T. R. 78.
^b 1 Str. 419. 1 Will. ^d Per Buller, Just. 4 T.
^e 3 Bur. 1389. ^e 3 T. R. 79.
 340. 279. R. 437. Cowp. 72. *semb.*
contra.

party, that it is brought for delay, is not sufficient^f. On a judgment recovered in the common pleas, the defendants first brought a writ of error in this court, and then brought another, returnable in Parliament, after which they nonpros'd the first writ of error, and then obtained a rule to shew cause, why the proceedings in the action in this court should not be stayed, pending the second writ of error; the court discharged the rule with costs; as it plainly appeared, from the defendant's own conduct, that there was no foundation for a writ of error, and that it could only be brought for vexatious purposes^g. So where a writ of error was brought on a judgment of nonsuit, the court refused to set aside an execution, sued out after notice of the allowance of a writ of error, because the writ of error in such case must evidently have been brought for the purpose of delay^h.

In order to stay the proceedings in an action of debt, or *scire facias*, on a judgment, pending a writ of error, it is necessary that the defendant should be first in court, by putting in bailⁱ. And where an action is brought

^f 3 T. R. 78.

ⁱ V. 432.

^g 2 T. R. 78.

ⁱ 5 T. R. 9.

^h 4 T. R. 436. H. Elac.

upon

upon a judgment of the court of common pleas, this court will not stay proceedings, pending a writ of error, without the defendant's giving judgment in the second action^k, and undertaking not to bring a writ of error upon that judgment^l. But if the action be brought upon a judgment of this court, these terms make no part of the rule; because, in general, actions on judgments are vexatious, and the plaintiff might have his execution on the first judgment^k. And where the proceedings were stayed, without imposing these terms, and the plaintiff died before judgment affirmed, the court would not afterwards permit judgment to be entered *nunc pro tunc*^m.

If the defendant bring a writ of error, and the plaintiff bring an action on the judgment, and recover, he cannot sue out execution on the second judgment, till the writ of error be determinedⁿ. According to this decision, the plaintiff cannot be benefited by bringing an action on the judgment, pending

^k Per Buller, Just. 1 T. R. 638.

^l Cowp. 72.

^m 1 T. R. 637.

ⁿ 3 T. R. 643. 4 Eur. 2454. S. P. but see 1 Str. 526. Barnes, 202. *semb. contra*.

a writ of error, except in cases where he may hold the defendant to special bail; and it is needless for the defendant to move the court to stay the proceedings in such an action, for if he let judgment go by default, the plaintiff cannot sue out execution.

On a *scire facias*, or action of debt on recognizance, against bail, when a writ of error is allowed, and the bail apply within their time for surrendering the principal^o, the court will stay the proceedings, until the writ of error is determined^p; the bail undertaking to pay the condemnation money, or surrender the defendant into the custody of the marshal, within four days next after the determination of the writ of error, in case the same shall be determined in favour of the defendant in error^q. And in one case^r, where the writ of error was allowed before the time was expired for surrendering the principal, though notice of such allowance was not given to the plaintiff's attorney, nor the application consequently made, till after the expiration of that time, the court gave the bail the same terms, as are usual when they apply within the time granted, by the course of the court, for

^o Ante, 144, 5 6.

^p 1 Str. 419.

^q 1 Bur. 340.

^r *Id. ib. d.*

sur-

surrendering the principal. But, in general, when the bail do not apply to stay the proceedings, pending error, till their time to surrender is out, the court will not give them any time for that purpose, but only four days to pay the money in, after the judgment is affirmed^a.

Where error was not brought till it was too late for the bail to surrender, the court, in one case, would not stay the proceedings^b. But, in a subsequent case^c, proceedings were stayed; the bail undertaking to pay the condemnation money, and the costs on the *scire facias*, in four days after affirmance; but in this case, there being no bail on the writ of error, the court made the bail also undertake to pay the costs, on the writ of error, in case the judgment was affirmed; and said, it was a favour they were asking, and they would make them submit to equitable terms. By the affirmance of the judgment, in these cases, is meant the final affirmance of it; and therefore where the judgment, on a writ of error, was affirmed in the exchequer chamber, and afterwards another writ of error was brought, returnable in parliament, the proceedings against the bail were further

^a 2 Str. 872, 1270.

^b 2 Str. 877.

^c 1 Str. 443.

stayed,

stayed, till the determination of the second writ of error ^v.

The plaintiff got judgment on the *scire facias* against bail, pending error by the principal, and took them in execution; and on their moving to be discharged, the court said, though you might have applied, and had the proceedings stayed, yet we will not set them aside. If an action of debt had been brought upon the judgment, we should have granted an imparlance, if it had been asked; but we never set aside the judgment, when it is once signed, because we take it, you, by your not applying in time, have submitted to meet the plaintiff. *Quod fieri non debet, factum valet* ^v.

In ejectment ^x, and actions *qui tam* ^v, where the plaintiff, or his lessor, is unknown to the defendant, the latter may call for an account of his residence, or place of abode, from the opposite attorney; and if he refuse to give it, or give in a fictitious account, of a person who cannot be found, the court will stay the proceedings, until security be given for the payment of costs. And in ejectment, where

^v 5 Bur. 2819.

3 T. R. 643. *semb. contra.*

^v 1 Str. 526. Barnes, 202.

^x 1 Str. 681.

accord. but see 4 Bur. 2454.

^v *Id.* 697. 705. Barnes, 126.

the lessor of the plaintiff is an infant^a, dead^a, or resident abroad^b, the court will stay proceedings, until a real and substantial plaintiff be named, or some responsible person undertake for the payment of costs. A similar undertaking is also required, in an action for the mesne profits, brought in the name of the nominal plaintiff in ejectment^c.

But except in ejectment^d, or actions *qui tam*^e, it was not formerly usual to require security for costs, where the plaintiff resided abroad^f: for it was considered, that such a proceeding might affect trade, by excluding foreigners from our courts; and would be a means of clogging the course of justice. But now, although a plaintiff is not compellable to give security for costs, merely as a foreigner, if he reside in this country, yet whether he be a foreigner or native, if he reside abroad, out of the reach of the process of

^a 1 Str. 694. 2 Str. 932. ^d 2 Bur. 1177. Say. Costs, 1206. 1 Willf. 130 Cowp. 153. S. C.
^b 24. Barnes, 183. B. N. P. ^e 1 Str. 697. 2 Str. 1206.
^c 112. but see Cowp. 128. 1 Willf. 266.
^f 2 Str. 1206. 1 Willf. 266. Say. Costs, 155.
^g 2 Bur. 1177. Say. Costs, 153. S. C.
^h 2 Bur. 1026. 4 Bur. 2105.
ⁱ Say, Rep. 78. Say. Costs, Cowp. 24. 158. 322.
 154. S. C.

the court, the proceedings may be stayed, till his return, or security be given for the payment of costs^s. These are the only grounds upon which the proceedings can be stayed, for want of security for costs: it being holden, that they shall not be stayed, even in a *qui tam* action, merely on account of the plaintiff's poverty^h; or in ejectment, where the lessor of the plaintiff is known, of full age, and resident in this countryⁱ.

In a second ejectment, the court will stay proceedings, until the costs are paid of a prior one, for the same cause^k; and that, whether it be brought in the same or a different court^l. And where the defendant in ejectment brings a writ of error, before he has quitted possession, the court will stay proceedings, pending the writ of error^m. But the vexation of the party is said to be the ground of these rulesⁿ; and therefore, if the

^s 1 T. R. 267. 362. 491. The defendant, in such case, must put in bail, previous to the application. 4 T. R. 697.

^h Cowp. 24. Barnes, 126.

ⁱ 1 T. R. 491.

^k 1 Salk. 255. 1 Str. 548. 554. 2 Str. 1152. 1200. 1

T. R. 492. K. B. Pr. Reg. 174. Barnes, 133. 2 Blac. Rep. 904. Say. Costs, 239. S. C. 2 Blac. Rep. 1158. 1180. C. B.

^l Same cases.

^m 1 Salk. 258, 9. and see

1 Str. 554.

ⁿ 4 Mod. 379. 2 Str. 1152.

second ejectment be brought by the defendant, after a recovery by the plaintiff, or there appears to be no vexation, the court will not make a rule for staying proceedings, until the costs are paid of the former ejectment^o.

In other cases, it was not formerly usual to stay the proceedings, in a second action, until the costs were paid of a prior one, for the same cause^p; and particularly, if the merits did not come in question, on the former trial^q. But of late years, it has been done, in several instances, on the ground of vexation^r: and in one case^s, where an action was brought by husband and wife, the court stayed the proceedings, until the payment of costs in a former action, at the suit of the husband only; it being for the same demand.

^o 4 Mod. 379. 1 Str. 681. ^q 1 Ld. Raym. 697.
² Str. 1099. 1121. Barnes, ^r 2 T. R. 511. K. B. Say.
180. Costs, 245. 247. 2 Blac.
^p 2 Str. 1206. Cowp. 322. Rep. 741. 3 Will. 149. S. C.
Say. Costs, 251. S. C. C. B.
¹ T. R. 491, 2. K. B. ^s *Lampley & wife v. Sands*,
Barnes, 125. C. B. but see H. 25 Geo. 3. K. B.
¹ Vent. 109.

C H A P. XXII.

**Of compromising, and compounding
the Action.**

WHEN the proceedings are regular, and cannot be stayed, on any of the grounds stated in the preceding chapter, the defendant, if he has no merits, either compromises the action, by paying or giving security for the debt and costs, compounds it, (if penal), confesses it, or lets judgment go by default.

In actions for the recovery of a sum certain, where the parties are agreed as to the amount of the debt, it is of course to stay the proceedings, on payment of the same, together with the costs of the action. And, in order to ascertain what is due to the plaintiff, the defendant may, at any time pending the action, take out a summons, and obtain an order, for the particulars of the plaintiff's demand*. If the parties are not agreed as to the amount of the debt, the defendant cannot stay the proceedings; but must either

* 3 Bur. 1390.

pay into court, on the common rule, what he conceives to be due, or let judgment go by default; and in actions for general damages, wherein the defendant cannot pay money into court, he has no option, but must let judgment go by default, unless he can settle amicably with the plaintiff.

The practice of staying the proceedings, on payment of the debt and costs, though frequently confounded with, is in reality very different from, that of bringing money into court, on the common rule; upon which the proceedings are not always stayed, but the plaintiff is at liberty to proceed, at his peril, for more than the sum brought in. And the practice, we are now treating of, extends to every sort of action, brought for the recovery of a sum certain, as *assumpsit* or *covenant* to pay money, and debt for rent, &c.^b If separate actions are brought in *assumpsit*, against the acceptor and indorsers of a bill of exchange, the court will stay proceedings against any of the indorsers, on payment of the bill, and costs of that action; but not against the acceptor, without payment of costs in all the actions^c. And if the plaintiff proceed to judgment,

^b Cas. temp. Hardw. 173. ^c 4 T. R. 691.

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the proceedings may still be stayed, on payment of the debt and costs^d: but in that case, each defendant is only liable for his own costs, and the plaintiff cannot take out execution against one defendant, for the costs of another.

In *debt*, for the penalty of five pounds, for killing a hare, with no other count, the court let the defendant bring in the penalty and costs^e. And in *debt* on bond, conditioned for the performance of covenants, or to account, indemnify, &c. the proceedings may be stayed, on payment of the whole penalty and costs^f, unless it appear that the damages exceed the penalty^g. We have already seen^h, in what cases the court will stay the proceedings, in actions upon bail bonds: It will be sufficient to add, in this place, that as the bail may render the principal, after an assignment of the bail bond, and before they justifyⁱ, so, when they have rendered him, the proceedings on the bail bond may be stayed, on payment of costs^k, provided the plaintiff has not lost a trial. On staying proceedings, in an action of debt on recognizance, the bail

^d 1 Str. 515.

^h *Ante*, 156, 7.

^e 2 Str. 1217.

ⁱ 5 T. R. 401.

^f 2 Blac. Rep. 1190.

^k *Id.* 534.

^g 2 T. R. 388.

above

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above must pay the costs in that, as well as the debt and costs in the original action, though they apply within the time allowed them for surrendering the principal¹.

In *debt* on bond, conditioned for the payment of a lesser sum, it was usual for the court, even before the statute 4 & 5 Ann. c. 16. to relieve the defendant against the penalty of the bond, on payment of the principal, interest and costs; but then the whole penalty must have been brought into court, and when the plaintiff was satisfied, the defendant might have taken what remained^m. By the above statute, it is enacted, that "if at any time, " pending an action upon any such bond with " a penalty, the defendant shall bring into " court all the principal money and interest " due on the bond, and also such costs as " have been expended in any suit or suits in " law or equity upon such bond, the said " money, so brought in, shall be deemed and " taken to be in full satisfaction and discharge " of the said bond; and the court shall and " may give judgment to discharge every " such defendant of and from the same ac-

¹ 5 T. R. 363. *Bartram* ^m 2 Salk. 597. 6 Mod.
and others v. *Howell*, T. 101.

31 Geo. 3. *contra*.

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“ cordingly.” Upon this statute it has been holden, that the plaintiff is intitled to the costs of proceedings in equity, relating to the same matterⁿ; but not to the costs of a former suit, wherein the judgment had been reversed on a writ of error^o: for there is no reason, why the defendant should pay for the error or mistake of the plaintiff.

It was formerly holden, that this statute did not extend to an action of debt on bond, conditioned for the payment of an annuity, or of money by instalments^p. But it is now settled, upon the equity of the statute, that in such an action, where the defendant is solvent, the court will stay the proceedings, on payment of the arrears and costs, and giving judgment as a security for future payments, with a stay of execution till they become due^q. And where, in an action on an annuity bond, it appeared that there were mutual accounts subsisting between the parties, the court made a rule for referring them to the master; and that upon payment of what, if any thing, should be found due to the plaintiff, all fur-

ⁿ Cas. temp. Hardw. 116.
ⁱ Str. 696. *contra*.
^o 1 Str. 696.

^p 1 Atk. 118. 1 Str. 515.
^q 2 Str. 814, 957. 2 Blac.
 Rep. 706. Barnes, 288.

ther proceedings should be stayed^r. But the court will not stay the proceedings, where the defendant appears to be insolvent; or the bond is conditioned for the payment of a gross sum of money absolutely, at a day certain, and afterwards defeazanced, in consequence of a subsequent agreement, to pay the money by instalments^s; or where, though the bond be conditioned for the payment of money by instalments, it is expressly agreed, that if default be made in any one payment, the bond is to stand in force, for the whole principal and interest then remaining due^t.

Before the statute 4 Geo. 2. c. 28. it was usual for the court to stay the proceedings in *Ejectment*, on a clause of re-entry for non-payment of rent, at any time before execution executed, on the tenant's bringing into court all the rent in arrear and costs^u. And now, by that statute^v, "If the tenant or his assigns shall, at any time before the trial, pay or tender to the landlord, his executors, &c. or pay into court, all the rent and arrears, together with the costs, all further proceedings on the said ejectment shall cease and

^r *Wilkinson and Jordan*, 2 Salk. 597. 10 Mod. 383.
H. 23 Geo. 3. 8 Mod. 345.

^s 3 Bur. 1370.

^v See the stat. § 4.

^t 2 Blac. Rep. 958.

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“be discontinued.” Since the making of which statute, it has been holden, as before, that after judgment against the casual ejector, and before any writ of possession executed, the court will stay the proceedings on payment of all the rent and costs^w.

So in *ejectment* by a mortgagee, for the recovery of the possession of the mortgaged premises, or in debt on bond conditioned for the payment of the mortgage money, or performance of covenants in the mortgage deed, where no suit in equity is depending for a foreclosure or redemption, “if the person
“having a right to redeem shall, at any time
“pending the action, pay to the mortgagee,
“or in case of his refusal bring into court, all
“the principal monies and interest due on the
“mortgage, and also costs to be computed
“by the court, or proper officer appointed
“for that purpose, the same shall be deemed
“and taken to be in full satisfaction and discharge of the mortgage; and the court
“shall discharge the mortgagor of and from
“the same accordingly^x.” Upon which statute, the court stayed the proceedings,

^w 1 Str. 900.

^x Stat. 7 Geo. 2. c. 20.
and see 1 Str. 413.

although

although it was objected, that the defendant had agreed to convey the equity of redemption to the plaintiff^y. And if there be any doubt, as to the amount of what is due, the court will refer it to the master, whose duty it is to tax the costs; and if the debt and costs are not paid, the plaintiff must proceed in the action, and cannot have an attachment^z.

In actions for general damages, it is a rule, that the proceedings cannot be stayed, on making satisfaction to the plaintiff. But there are some exceptions to this rule: In *replevin*, for instance, where the defendant avows for rent, the court will stay the proceedings, on bringing it into court, and payment of costs^a. But the proceedings cannot be stayed, where the avowry is for damage feasant^b; because the court in such case have no rule to guide them in ascertaining the damages.

In *trover* for money, the court will give the defendant leave to bring it into court^c. And where *trover* is brought for a specific chattel, of an ascertained quantity and quality,

^y 1 Will. 80.

1 V. 24.

^z 2 Str. 1220.

^b 8 Mod. 379.

^a 2 Salk. 597. H. Blac.

^c 1 Str. 142.

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and unattended with any circumstances that can enhance the damages above the real value, the court will make an order for staying the proceedings, upon delivering it to the plaintiff, and payment of costs^d. And this is the more reasonable, as the action of trover comes in place of the old action of detinue. But the court will not stay the proceedings, where there is an uncertainty, either as to the quantity or quality of the thing demanded; or there is any tort that may enhance the damages above the real value, and there is no rule whereby to estimate the additional damages^e.

In trover, by the assignees of a bankrupt, for a steam engine, &c. the court made a special rule for staying the proceedings, on delivering to the plaintiffs a part of the goods for which the action was brought, and payment of costs up to that time, provided the plaintiffs would accept thereof in discharge of the action; or otherwise, that the articles deli-

^d 3 Bur. 1364. Say. Rep. but see 2 Salk. 597. 2 Str. 80. 2 *Eunom.* 144, 5. 822. Id. 1191. 1 Will. 23. Barnes, 231. Pr. Reg. 260. S. C. Say. Rep. 120. *cont.* Cas. Pr. C. B. 130. S. C. ^e 3 Bur. 1364.

vered should be struck out of the declaration, and the plaintiffs be subject to costs, unless they should obtain a verdict for the remainder of the goods, or prove a deterioration of the part delivered up^f.

The *Security* usually given, by the defendant to the plaintiff, on compromising an action, and which is also frequently given where no action is depending, is a warrant of attorney; so called, from its authorising the attorney, or attornies, to whom it is directed, to appear for the defendant, and receive a declaration, in an action to be brought against him; and thereupon to confess the same action, or suffer judgment therein to pass by default, &c.

Every warrant of attorney should be given voluntarily, and for a good consideration. Therefore if a warrant of attorney be obtained by fraud^g, or for a corrupt and usurious consideration^h, the court will order it to be delivered up, and set aside the judgment and proceedings which have been had under it. So if a warrant of attorney be given by an

^f *Brunsdon and others, Affinees, &c. v. Lustin, T.* 34 Geo. 3. ^g Doug. 196. ^h Cowp. 727.

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infant, or by one of several executors to confess a judgment against allⁱ, the court will order it to be delivered up, &c. But where a feme covert who lived by herself, and acted as a feme sole, gave a warrant of attorney to confess a judgment, and afterwards moved to set aside the judgment, because she was covert, the court would not relieve her, but put her to her writ of error^k.

Where the defendant is in custody by arrest, it is a rule^l, that “no bailiff or sheriff’s officer shall presume to exact or take from him, any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant, who shall subscribe his name thereto; which warrant shall be produced, when the judgment is acknowledged: and if any bailiff or sheriff’s officer shall offend therein, he shall be severely punished. And no attorney shall acknowledge or enter, or cause to be acknowledged or entered, any judgment, by colour of any warrant, gotten from any defendant, being under arrest, otherwise than as aforesaid.” Upon this rule it was deemed sufficient for the plaintiff’s attorney to be present, and

ⁱ 1 Str. 20.

^l R. E. 15 Car. 2. II.

^k 1 Salk. 400.

subscribe

subscribe the warrant, as attorney for the defendant^m. And therefore another rule was madeⁿ, that “no warrant of attorney for confessing a judgment, executed by any person in custody, shall be of any force, unless some attorney, for and on behalf of such person in custody, and expressly named by him, be present, to inform him of the nature of such warrant, &c.” These rules have been construed to extend to warrants of attorney executed abroad^o.

But still it is sufficient, if there be an attorney present, on behalf of the defendant, though he be not an attorney of the same court, in which the judgment is to be entered^p. And the rules only extend to warrants of attorney given by a defendant in custody, upon *mesne* process, in a civil action, to a plaintiff at whose suit he is in custody: therefore where a warrant of attorney is given by a defendant in custody upon process of *execution*^q, or upon criminal process^r, or to a third person, at whose suit the defendant is not in custody^s, an

^m 2 Str. 1245.

^q 2 Str. 1245. Cowp.

ⁿ R. E. 4 Geo. 2. 2 Str. 281. 1 T. R. 715.

902. Cowp. 281.

^r 4 T. R. 433.

^o 2 Str. 1247.

^s 5 Mod. 144. 2 Ld.

^p 1 Str. 530.

Raym. 797. 3 Bur. 1792.

Cowp. 142.

attorney's

attorney's presence is unnecessary. And the court will not suffer a defendant to convert that which was meant for his protection, into an instrument of fraud and deceit: therefore where a warrant of attorney was executed in the presence of an attorney's clerk, and it appeared from the defendant's affidavit that he was the more induced to execute it, because he had been informed, that if he did execute it under an arrest, and without his attorney being present, it would be void, the court refused to set aside the proceedings^t.

On the other hand, though the case is not strictly within the rule, yet the court will sometimes interpose, and give relief, under particular circumstances; for it is the province of the court to guard against the arts of designing men, practised upon persons under the pressure of distress and imprisonment. Thus if it could be shewn, that a party, even in execution, had been prevailed on to acknowledge a judgment, for more money than was really due, the court would give relief under the circumstances^u; because cases of fraud and imposition are exceptions to all rules whatsoever. And in a late case *v*, where

^t Cowp. 142.^u Id. 281.*v* 3 T. R. 616.

interlocutory

interlocutory judgment being signed against a prisoner in custody of the marshal, the plaintiff's attorney took a *cognovit* from him for 200 *l.* with a defeazance on paying 49 *l.* (the real debt) and costs, but no attorney was present on the part of the defendant; though this case was not strictly within the rule, which only mentions prisoners in custody of sheriff's officers, yet the court interfered for the relief of the prisoner.

By the course of the court, a warrant of attorney given to confess a judgment is not revocable^w; and if the party giving, endeavour to revoke it, the court will notwithstanding give the other party leave to enter up judgment. But the death of either party is, generally speaking, a countermand of the warrant of attorney^x: and therefore, upon a motion to enter up judgment on an old warrant of attorney, if it appear to the court, that either party is dead, they will not grant the motion^y. Yet if either party die in vacation, within a year after giving the warrant of at-

^w 2 Ld. Raym. 766. 850. ^y 2 Str. 713, 1081. Vin.
1 Salk. 87. 7 Mod. 93. S.C. Abr. tit. *Judgment*, W. 7.

^x Co. Lit. 52. b. 1 Vent. Barnes, 270.

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torney, judgment may be entered up of course, at any time after, in that vacation²; and it will be a good judgment, at common law, as of the preceding term, though it be not so upon the statute of frauds, in respect of purchasers, but from the signing³. And even where the party dies after the year, if the court can be prevailed upon to grant a rule for entering up judgment, they will not afterwards set it aside^b. Where there are several parties, and one of them dies before judgment, it may be entered by or against the survivors^c.

When a warrant of attorney is given to a feme sole, who marries before judgment, the authority is not deemed to be countermanded or revoked; because it is for the husband's advantage^d. And therefore, notwithstanding the marriage, judgment may be entered up, in the names of the husband and wife. But, in order to warrant this entry, there should be a previous application to the

² T. Raym. 18. 2 Ld. Abr. tit. *Judgment*, W. 7. Raym. 766, 850. 1 Salk. Barnes, 270.

87. 7 Mod. 93. S. C. 2 Str. ^c 1 Willf. 312. Say. Rep. 882. Barnes, 267, 8. 5. S. C. Barnes, 40, 53. but

^a 1 Salk. 401. 7 Mod. see Barnes, 45. *contra*. 39. S. C. ^d 12 Mod. 383. 7 Mod.

^b 2 Str. 882, 1081. Vin. 53. 1 Salk. 117. S. C.

court,

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court, founded on an affidavit of the marriage^e. And, in one case^f, it is said to have been ruled upon motion, that if a woman give a warrant of attorney, and then marry, you may file a bill, and enter judgment, against both, by the practice of the court. But in a subsequent case^g, it is said, that if a feme sole give a warrant to confess a judgment, and marry before it be entered, the warrant is countermanded, and judgment shall not be entered against husband and wife, for that would charge the husband^h.

If a warrant of attorney be given, to appear and confess judgment of a particular term, the judgment should be entered accordingly of that term, and cannot be entered of any otherⁱ. But if the warrant of attorney be given, to appear and confess judgment generally, or (as is most usual) of a particular or any subsequent term, judgment may be en-

^e 3 Bur. 1471.

^f 1 Show. 91. Say. Rep. 6. 3 Bur. 1470. S. C. cited.

^g 1 Salk. 399. 7 Mod. 53. S. C. cited.

^h *Tamen quære*; for it seems as reasonable, that he

should be charged in this case, as for a bond or other debt, which he is liable for during the coverture, tho' not after. 1 Salk. 117. cites 1 Roll. Abr. 351. F. 1. G. 2. F. N. B. 120. F. 1 Mod. 1. 7 Mod. 53.

tered

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tered of any term after giving the warrant^k. Where a warrant of attorney was given in vacation, and judgment was entered up thereon, as of the preceding term, the court ordered the judgment to be set aside, for the danger that might otherwise ensue to purchasers^l. And where a warrant of attorney was given to confess judgment, at the suit of an executor, as of the preceding term, when the testator was living, and the judgment was entered up accordingly, the court held it to be irregular^m; for the attorney could have no authority to appear in that term, at the suit of the executor, and the judgment must be considered as of that term, though to other purposes the day of signing is material.

Within a year and a day next after the date of the warrant, judgment may be entered of course, without applying to the court or a judge. But if it be not entered within that time, the court must be movedⁿ, in term time, or if the warrant of attorney be not

^k 1 Mod. 1. 7 Mod. 53. ly from the time of sign-

^l 1 Sid. 222. but note, ing.

this was before the statute ^m 2 Str. 1121.

of frauds, by which judg- ⁿ 7 Mod. 94. 6 Mod.
ments affect purchasers, on- 212. 1 Wils. 36. arg.

above ten years old^o, an application may be made to a judge, in vacation^p, for leave to enter up the judgment, on an affidavit of the due execution of the warrant of attorney, that the debt, or part of it, is still due, and that the parties are living. On making the application, the court or judge expect to be informed, when the defendant was alive: and any time during the same term is deemed sufficient; for though he should be since dead, yet the judgment, by relation back to the first day of the term, will appear to have been given in his life-time.

The judgment upon a warrant of attorney, being in *debt*, is always final; and signed in like manner as a final judgment by confession or default in an adverse suit, which will be treated of in the next chapter.

In order to compound a penal action, application must be made to the court wherein it is depending, founded upon the statute 18 Eliz. c. 5. § 3. by which it is enacted, that
 “no common informer or plaintiff shall or
 “may compound or agree, with any person or

^o Imp. K. B. 410.

^p *Id. ibid.*

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“ persons that shall offend, or that shall be
“ surmised to offend, against any penal statute,
“ for an offence committed, or pretended to be
“ committed, but after answer made in court,
“ to the information or suit in that behalf ex-
“ hibited or prosecuted ; nor after answer, but
“ by the order or consent of the court, in which
“ the same information or suit shall be depend-
“ ing; upon the pains and penalties therein set
“ down and declared.” But this statute extends
only to *common* informers, who are to have
the whole benefit of the penalty ; and not
where the penalty, or part of it, is given to
the party *grieved*¹.

The application upon this statute is made
by consent, upon an affidavit, setting forth
the nature of the action, the state of the cause,
the agreement of the parties, and that no
more than a certain sum is given or ta-
ken², &c. which application may be made
before or after verdict³ : even where the de-
fendant was in execution, the court, on an
affidavit of his poverty, gave the plaintiff
leave to compound with him⁴. Upon the
application being made, it is in the discretion
of the court to give or with-hold their leave

¹ 1 Salk. 30.

² Imp. K. B. 646.

³ 5 T. R. 98.

⁴ 1 Str. 167.

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to compound ^u: and it is a general rule, that where they give leave to compound a penal action, the king's half of the composition shall be paid into the hands of the master of the crown office, for the use of his majesty ^v; which is now usually done before the rule is drawn up ^w. If a defendant in a penal action obtain a rule to stay proceedings, on paying a sum agreed upon between him and the plaintiff, it is an undertaking by him to pay that sum; and for the non-payment of it, the court will grant an attachment ^x.

^u 1 Will. 79, 130.

^v 3 Bur. 1929.

^w Imp. K. B. 646.

^x 5 T. R. 257.

C H A P. XXIII.

Of Judgment by Confession
and Default.

WHEN the defendant, having no merits, cannot compromise or compound the action, it is usual for him to confess it, or let judgment go by default.

The objects proposed by confessing an action are two-fold; first, in an action for damages, to save the expence of executing a writ of inquiry, and secondly, to obtain terms, such as a stay of execution, &c. And the confession, or as it is usually called, from the entry of it, a *cognovit actionem*, is either before or after plea pleaded; in the latter case, the plea being withdrawn, it is called a confession or *cognovit actionem, relicta verificatione*.

In general, the confession is made after declaration, and before plea; and written on the declaration or stamped paper, thus, " I
" confess this action, or, if in *debt*, the debt in
" this cause, and that the plaintiff hath sustained damages to such an amount, besides
" his

"his costs and charges, to be taxed by the
"master:" then follow the terms, if any
are agreed on, as that "no judgment shall be
"entered up, or execution issue, until default
"shall be made in payment of the debt or
"damages and costs, by a certain day, and that
"no writ of error shall be brought, or bill in
"equity filed; but that in case default shall
"be made, the plaintiff shall be at liberty to
"enter up judgment, and take out execution,
"for the debt or damages and costs, together
"with sheriff's poundage, and all other inci-
"dental expences." Where the confession is
after plea pleaded, the defendant's attorney
ought to come in person before the master,
to withdraw it^a.

Again, the confession is either of the *whole*,
or *part* of the cause of action. If it be of the
whole, and not upon terms, the plaintiff's at-
torney may immediately sign final judgment,
and take out execution thereon; but if it be not
of the whole, he can only sign judgment for
the part confessed, and must answer to the
residue. Where a judgment is confessed up-
on terms, it being in effect but a conditional
judgment, the court will take notice of it,

^a 1 Ld. Raym. 345.

and see the terms performed : but where the judgment is acknowledged absolutely, and a subsequent agreement made, this does not affect the judgment, and the court will take no notice of it, but put the party to his action on the agreement ^b. And it has been said ^c, that the court cannot hold plea of an agreement upon motion. But it is usual in practice, to set aside a judgment entered up, and execution taken out, contrary to the agreement of the parties, at the time of confessing the judgment ^d.

Judgment by default, which is an implied confession of the action, is either by *nil dicit*, where the defendant appears, but says nothing in bar or preclusion of the action; or by *non sum informatus*, where his attorney says, he is not informed of any answer to be given thereto. Judgment by *nil dicit* is either for want of any plea at all, or for want of a plea adapted to the nature of the action, or circumstances of the case, or for not pleading in due time or proper manner.

^b 1 Salk. 400.

^d 6 Mod. 14.

^c *Id. ibid.*

On the expiration of the time for pleading, a rule to plead having been given, and a plea demanded, when necessary, the plaintiff's attorney should search for a plea, if not delivered to him, with the clerk of the papers, who receives special pleas, and with the clerk of the judgments, who keeps the general issue book, at the king's bench office; and if no plea be delivered, or found at either of those offices, the plaintiff's attorney may sign judgment as for want of a plea. And judgment may be signed in like manner, if the defendant do not rejoin^e, plead to a new assignment, or join in demurrer, when necessary; or do not pay for the issue, or return the paper book or demurrer book, and pay for the entries, in due time.

When the defendant pleads a plea not adapted to the nature of the action, as *nil debet* in *assumpsit*^f, &c. the plaintiff may consider it as a mere nullity, and sign judgment. So if the defendant, after craving oyer of a deed, do not set forth the whole of it, the plaintiff may sign judgment, as for want of a plea^g. But the plea of not guilty, in an action of debt

^e 5 T. R. 152.

^f Barnes, 257.

^g 4 T. R. 370. *Slater v.*

Horne, E. 34 Geo. 3. S. P.

on a penal statute, is not such a nullity, as will warrant the plaintiff in signing judgment^h. If the defendant, when under an order to plead *issuably*, put in a plea which, though informal, goes to the substance of the action, the plaintiff cannot sign judgment as for want of a pleaⁱ. And, in general, where the defendant pleads an improper plea, the safest course is not to sign judgment, but to demur, or move the court to set it aside.

If the defendant plead a judgment recovered, or other plea that is not *issuable*, after a judge's order for time to plead, on the terms of pleading *issuably*, the plaintiff may sign judgment, as for want of an *issuable* plea^j. And he may also sign judgment, where the defendant pleads in abatement, after the expiration of four days inclusive, from the delivery or filing and notice of declaration^k; or a plea of tender, without paying the money into court^l: or where a plea of *solvit ad diem*, which ought to be delivered to the plaintiff's attorney, is entered in the general issue book.^m

^h 1 T. R. 462.

ⁱ 5 T. R. 152.

^j 1 Bur. 59.

^k 1 T. R. 277, 689.

^l 1 Str. 638.

^m *Lockhart & others v. Mackreth*, T. 34 Geo. 3.

The plaintiff may *waive* a judgment by defaultⁿ; or if *irregular*, the defendant may move the court to set it aside. But the motion for this purpose must be made, or notice given of it in vacation, two days at least before the day appointed for executing the inquiry. And even though the judgment be *regular*, yet where the plaintiff has not lost a trial, the court on motion will set it aside, upon an affidavit of merits, and payment of costs^o. And the court will do this in *ejectment*, as well as in other actions^p. But they will not set aside a regular judgment, to give the defendant advantage of a nicety in pleading^q; or to let him in to plead the statute of limitations^r.

A judgment by default is *interlocutory* or *final*. Where the action sounds in damages, as in *assumpsit*, covenant, trover, trespass, &c. the judgment is only interlocutory, that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained. And the judgment for the plaintiff, in these actions, is also interlocutory, on demurrer or *nul tiel record*. Where the

ⁿ Trin. 23 Car. 1. K. B. ^p 2 Str. 975. 4 Bur. 1996.

^o 1 Salk. 402. 2 Salk. 518. ^q 2 Str. 1242.

2 Str. 823. 1 Bur. 568.

^r 1 Blac. Rep. 35.

action is brought for the recovery of a sum certain, as in *debt*, the judgment at common law is final. But by the statute 8 & 9 W. 3. c. 11. § 8. it is enacted, that “ in all
 “ actions upon any bond or bonds, or on any
 “ penal sum, for non-performance of any
 “ covenants or agreements, in any indenture
 “ deed or writing contained, if judgment shall
 “ be given for the plaintiff, on a demurrer, or
 “ by confession, or *nihil dicit*, the plaintiff upon
 “ the roll may suggest as many breaches of the
 “ covenants and agreements, as he shall think
 “ fit ; upon which shall issue a writ to the she-
 “ riff, to summon a jury, to enquire of the
 “ truth of those breaches, and to assess the da-
 “ mages that the plaintiff shall have sustained
 “ thereby.” This statute, which relates to co-
 venants and agreements in the same, as well
 as a different instrument, has been held to be
 compulsory on the plaintiff^s ; and of course
 he cannot now enter up judgment for the
 whole penalty, on a judgment by default, as
 he might have done at common law.

An interlocutory judgment is signed on
 treble penny stamped paper, with the clerk
 of the judgments, in the king's bench office ;
 an *incipitur* being first entered on a roll
 of the same term with the declaration.

^s 5 T. R. 538, 636.

Final judgment is signed on a double half crown stamped paper ; and no rule for judgment being necessary, the plaintiff may immediately proceed to tax his costs, and take out execution.

After an interlocutory judgment, a writ of inquiry of damages is in general awarded; which is a judicial writ, directed to the sheriff of the county where the action is laid ; setting forth the proceedings which have been had in the cause, “and that the plaintiff
“ought to recover his damages, by occasion
“of the premises ; but because it is unknown
“what damages he hath sustained by occasion thereof, the sheriff is commanded, that
“by the oath of twelve honest and lawful
“men, he diligently inquire the same ; and
“return the inquisition into court.”

In an action on the case upon two promises, there was judgment by default as to the first promise, and as to the second a *nolle prosequi*. A writ of inquiry was taken out, to inquire what damages the plaintiff had sustained, *by occasion of the premises* ; and upon the return of this, it was moved to amend the writ, and make it, *by occasion of the not performing of the first promise* :

And, upon the authority of *Baker* against *Campbell* ^u, the writ was amended in this case; the record of the judgment by default being a warrant to amend by ^v.

The writ of inquiry should be returnable on a general return, or day certain, according to the nature of the proceedings: if by *original*, on a general return; if by *bill*, on a day certain. But where, in an action by bill against an attorney, the writ of inquiry was returnable on a general return, it was holden not to be error; but only a mis-continuance, and cured by the statutes of jeofails ^w.

A writ of inquiry of damages is a mere inquest of office, to inform the conscience of the court; who, if they please, may themselves assess the damages ^x. And it is accordingly the practice, in actions upon promissory notes and bills of exchange, instead of executing a writ of inquiry, to apply to the court, for a

^u E. 4 Ann. B. R.

^v 1 Str. 684.

^w 2 Str. 947. Say. Rep. 245.

^x See H. Bl. 1 V. 542. and the several cases there cited. And, in confirmation of this doctrine it may be observ-

ed, that the courts have always exercised a power of setting aside inquisitions for small or excessive damages; and in some cases, of increasing them. Say. Dam. 173, &c.

rule to shew cause, why it should not be referred to the master, to see what is due for principal and interest, and why final judgment should not be signed for that sum, without executing a writ of inquiry; which rule is made absolute, on an affidavit of service, unless good cause be shewn to the contrary^y. This practice however is confined to actions upon promissory notes and bills of exchange, where the *quantum* of damages depends on figures, which may be as well ascertained by the master as before a jury: and therefore where the defendant had suffered judgment by default, in an action of *assumpsit*, on a foreign judgment, the court refused to make the rule absolute, for a reference to the master; saying, this was an attempt to carry the rule further than had yet been done, and as there was no instance of the kind, they would not make a precedent for it^z. In a subsequent case^a, the court refused to make the rule absolute, in an action upon a bill of exchange, for *foreign* money; the value of which is uncertain, and can only be ascertained by a jury^b.

^y 4 T. R. 275. and see H. Blac. 1 V. 252, 529, 541.

^z 4 T. R. 493.

^a 5 T. R. 87.

^b Cro. Eliz. 536. Cro. Jac. 617.

Where

Where the jury, upon the trial of an issue, omit to assess the damages, the omission may in some cases be supplied, by a writ of inquiry ^c. As to which it seems, that where the matter, omitted to be inquired by the principal jury, is such as goes to the very point of the issue, and upon which, if it be found by the jury, an attaint will lie against them, by the party, if they have given a false verdict; there such matter cannot be supplied by a writ of inquiry, because thereby the plaintiff may lose his action of attaint, which will not lie upon an inquest of office ^d.

Thus where, in *detinue*, the jury omitted to assess the value of the goods, the court refused to supply the omission, by a writ of inquiry ^e. And so where the jury, who try the issue in *replevin*, omit to inquire of the rent in arrear, and value of the cattle, pursuant to the statute, 17 Car. 2. c. 7. no writ of inquiry can be afterwards awarded, to supply the omission ^f: for by the words of the statute, these

^c *Cheyney's case*, 10 Co. 118. ^f 1 Sid. 380. T. Raym. 170. 1 Ventr. 40. 2 Keb.

^d Carth. 362. 2 Str. 1052. 408. 1 Lev. 255. 2 Str.

^e 1 Sid. 246. T. Raym. 1052. Gilb. *Dist.* 165.
124. 1 Keb. 882.

matters are to be inquired of by the *same* jury who try the issue ^g.

But where the matter, omitted to be inquired by the principal jury, doth not go to the point in issue, or necessary consequence thereof, but is merely collateral, as the four usual inquiries on a *quare impedit* ^h, there such matter may be supplied by a writ of inquiry, without any damage to the party; because if the same had been inquired of by the principal jury, it would have been, as to those particulars, no more than an inquest of office, upon which an attain will not lie ⁱ.

Thus, where the parties being at issue in *assumpsit*, a demurrer was joined upon the evidence, and the jury discharged, without assessing the damages; and afterwards judgment was given for the plaintiff, and a writ of inquiry of damages awarded; the court held, that though the same jury might have assessed the damages conditionally, yet it may be as well done by a writ of inquiry of damages, when the demurrer is determined; and the most usual course is, when there is a demurrer

^g 1 Salk. 205, 6. Cas. temp. Hardw. 141.

^h *Cheyney's case*, 10 Co. 118.

ⁱ Carth. 362.

upon

upon evidence, to discharge the jury, without further inquiry^k.

So in *trespass* or *replevin*, against overseers of the poor, acting *virtute officii*, if the plaintiff be nonsuit^l, or have a verdict against him^m, and the jury are discharged, without inquiring of the treble damages, pursuant to the statute, 43 Eliz. c. 2. § 19. the defect may be supplied by a writ of inquiry; because such inquiry is no more than an inquest of office. In such case, as a ground for awarding a writ of inquiry, it is necessary to enter a suggestion upon the roll, that the defendants were overseers of the poor; and that the action was brought against them, for something done by virtue of their officeⁿ.

The writ of inquiry may be executed, on due notice, before the sheriff or his deputy^o; or by leave of the court, under special circumstances, before the chief justice^p, or a

^k Cro. Car. 143.

2 Str. 1021. S. C. Say. Rep.

^l 1 Rol. Rep. 272. 2 Rol.

214. 3 Willf. 442.

Rep. 112. 5 Mod. 76, 7,

ⁿ Casf. temp. Hardw. 138.

118. Carth. 362. 1 Salk.

Say. Rep. 214.

205. Skin. 595. Comb.

^o 2 Willf. 379.

344. S. C.

^p 12 Mod. 519. 1 Str. 612.

^m Casf. temp. Hardw. 138.

2 Str. 853. Barnes, 233.

judge of assize, as an assistant to the sheriff^a. And where the writ of inquiry is executed before the chief justice, or a judge of assize, it is usual to move the court, for the sheriff to return a good jury^r. But unless some matter of law is likely to arise in the course of the inquiry, the court will not give leave to have it executed before a judge, merely on account of the importance of the facts.

The notice of inquiry should be in writing^s; and if the defendant have appeared, and his attorney be known, it should be delivered to such attorney^t: but if the defendant have not appeared, or his attorney be unknown, the notice should be delivered to the defendant himself, or left at his last place of abode^u. If the venue be laid in *London* or *Middlesex*, and the defendant live within forty *computed*^v miles from *London*, there must be *eight* days notice of inquiry, exclusive of the day it is given^w; which notice is also sufficient in country causes: for the statute, 14 Geo. 2. c. 17. § 4. which requires *ten* days notice of

^a 12 Mod. 610.

^v 2 Str. 954, 1215.

^r Imp. K. B. 407.

^w Sty. P. R. tit. *Notice*,

^s R. M. 4 Ann. (c)

421. 6 Mod. 146. R. M. 4

^t Say. Rep. 135.

Ann. (c) 8 Mod. 21.

^u *Id. ibid.*

trial at the assizes, does not extend to notices of inquiry. But where the venue is laid in *London* or *Middlesex*, and the defendant lives above forty computed miles from *London*, there must be *fourteen* days notice of inquiry. And *Sunday* is to be accounted a day in these notices, unless it be the day on which the notice is given^x. *Short* notice of inquiry is the same as short notice of trial: and where a term's notice of trial is required, there must, at the same distance of time, be the like notice of inquiry^y.

Where the inquiry is to be executed before the chief justice, or a judge of assize, the notice should be given for the sittings, or assizes, generally; but otherwise the notice should express the particular time and place of executing it^z. A writ of inquiry may be executed, in point of time, on the day it is returnable^a, but not on a *Sunday*^b; and where the notice was to execute it *by* ten o'clock, the court set it aside for uncertainty^c. The usual way is to give notice that the inquiry will be ex-

^x R. M. 4 Ann. (c) 8 Mod. ^a 2 Ld. Raym. 1449.

21.

^b 1 Str. 387.

^y 2 Str. 1100.

^c 2 Str. 1142.

^z Say. Rep. 181.

ecuted,

ecuted, *between* two certain hours ^d; as between ten and twelve o'clock in the forenoon, or between four and six in the afternoon, of a particular day, on or before the return of the writ. On a notice of inquiry so given, the party is not tied down to the precise time fixed by the notice; for the sheriff may have prior business, which may last beyond it. Therefore where notice was given of executing an inquiry, between ten and twelve o'clock, and the irregularity complained of was, that the defendant and his witnesses attended till twelve, and after the hour was elapsed, and they were gone, the writ was executed; the court refused to set aside the inquisition, conceiving it was clearly a trick of the defendant's attorney, to leave the place immediately after the hour was passed ^e.

With regard to the place of executing an inquiry, it must be executed within the county, where the action is laid. In *Middlesex*, inquiries are usually executed, in the morning during term time, at the King's Arms Tavern, *Palace Yard, Westminster*; and in the afternoon during term time, as well as in vacation, at the sheriff's office in *Took's-court*,

^d Say. Rep. 181.

^e Doug. 198.

Curfitor-street, Chancery-lane^f. In *London* they are executed, in term time as well as vacation, at the Secondary's office, No. 10, *Grocers'-hall* court, in the *Poultry*^f: and the notice should be given accordingly. Notice of inquiry may be *continued* or *countermanded*, in like manner as notice of trial^g.

In *London* and *Middlesex*, the writ must be left at the sheriff's office, the day before the time appointed for its execution^h: And if either party propose to attend by counsel, he should give notice thereof to his adversary, or he will not be allowed for it in costsⁱ. The execution of the writ may be *adjourned* by the sheriff, after it is entered upon^k. And if the plaintiff do not proceed to execute the inquiry according to notice, or countermand in time, the defendant, on an affidavit of attendance and necessary expences, shall have his costs, to be taxed by the master^l.

Letting judgment go by default is an admission of the cause of action: and therefore, where the action is founded on a contract, the defendant cannot give in evidence that it was

^f Imp. K. B. 402.

^k 2 Str. 853, 1259.

^g Id. 402, 3.

^l 1 Str. 317. 2 Str. 728.

^h R. H. 23 G. 3.

R. H. 8 G. 1. (a)

ⁱ Imp. K. B. 406.

fraudulent.

fraudulent^m. So in an action on a promissory note or bill of exchange, the note or bill need not be proved, though it must be produced before the jury, in order to see whether any money appears to have been paid upon itⁿ. And where an action was brought on a policy of assurance, on a foreign ship, wherein there was a stipulation, that the policy should be deemed sufficient proof of interest; the plaintiff, on the writ of inquiry, was only bound to prove the defendant's subscription to the policy, without giving any evidence of interest^o.

On the return of the inquiry, the plaintiff should give a rule for judgment, with the clerk of the rules, which expires in four days^p. And, in the mean time, the defendant may move to set aside the inquisition, for want of due notice^q; or on account of an objection to the jury, or mode of returning them, as that some of the jury were debtors, taken out of prison for the purpose of attending^r, or that they were returned by the plaintiff's attorney^s; or for excessive da-

^m 1 Str. 612.

^p 1 Salk. 399. Imp. K.

ⁿ 2 Str. 1149. Barnes, B. 404.

233, 4. 3 Will. 155. Doug. ^q Sty. P. R.

316. 3 T. R. 301. H. Blac. ^r 4 T. R. 473.

^s 1 v. 543.

^t Cowp. 112.

^u Doug. 315.

images^t. The plaintiff, in like manner, may move to set aside the inquisition, when it is obvious the damages are too small^u; except in vindictive^v, hard^w, or trifling actions. On the expiration of the rule for judgment^x, the sheriff, being called upon for his return, will deliver it, with the inquisition, to the plaintiff's attorney; who gets the inquisition stamped, with a double half crown stamp, and taxes his costs thereon with the master.

The want of a writ of inquiry is aided by the statute of Jeofails^y. And where a writ of inquiry had been many years executed, and costs taxed upon it, but no final judgment entered up; there being occasion to prove the debt in *Chancery*, and the writ of inquiry being lost, a rule was made for a new writ of inquiry and inquisition, according to the sheriff's notes, and that the master should indorse the costs, which by the commitment book appeared to have been taxed^z.

^t 2 Leon. 214. 3 Leon. dist. K. B. 177. S. C. 117. S. C. 3 Bur. 1846.

^w 2 T. R. 261.

^u 2 Salk. 647. 1 Str. 425,

^x 1 Salk. 399. Imp. K. B.

515. 8 Mod. 196, 213.

399, 404.

2 Str. 1259. but see 2 Leon.

^y 2 Str. 878.

21. 3 Leon. 117. S. C.

^z Id. 1077.

^v 2 Str. 940. 2 Barnar-

C H A P. XXIV.

Of Pleas to the Jurisdiction, claiming
Conulance, and Pleas in Abate-
ment.

HITHERTO we have supposed the action to be rightly brought, and considered what is to be done, when the defendant has no merits. We have seen that, in such case, he should compromise or compound the action, confess it, or let judgment go by default. But when the case is different, and any exception can be taken to the action, in point of *form*, or any answer given to it upon the *merits*, in fact or in law, the defendant should plead, or demur to the declaration.

The General Order of Pleading is,

1. *To the Jurisdiction of the Court.*
2. *To the Person,*
 1. *Of the Plaintiff:*
 2. *Of the Defendant.*
3. *To the Count.*
4. *To the Writ; and herein,*
 1. *To the Form:*
 2. *To the Action of the Writ.*
5. *To the Action itself, in Bar thereof^a.*

^a Co. Lit. 303. Latch, 178. Gilb. C. P. 49.

By this order of pleading, each subsequent plea admits the former: as when the defendant pleads to the person, he admits the jurisdiction of the court; when he pleads to the count, he admits the competency of the plaintiff, and his own responsibility; when he pleads to the form of the writ, he admits the form of the count^b; and in like manner of the rest.

Pleas to the jurisdiction of the court are either in *local* or *transitory* actions. In *local* actions, it is a good plea to say that the lands are ancient demesne, holden of the king's manor^c; or that the cause of action arose in *Wales*^d, or beyond the sea^e, or in a county palatine^f, cinque port^g, or other *exempt* jurisdiction^h.

In *ejectment*, the tenants in possession cannot plead to the jurisdiction, without leave of the courtⁱ: and, where antient demesne is

^b Gilb. C. P. 50.

^e 4 Inst. 224. Jenk. 190.

^c Herne, 7, 351. Rastal, 101. Hans. 103. Thomp. 2. 3 Inst. Cl. 8, 9. 1 Salk. 56. 2 Ld. Raym. 1418.

Keilw. 88, &c. S. C. 3 Inst. Cl. 7. but see Yelv. 12, 13. Carth. 109.

^d 1 Wilf. 193.

^h Bro. Abr. tit. *Consuance*, 52. 1 Blac. Rep. 197.

^e 1 Salk. 80. 1 Show. 191. S. C.

ⁱ 1 Barnardist. K. B. 7. 352, 365. Andr. 368. 2 Str.

^f Rastal, 419. Herne, 7. 3 Inst. Cl. 14.

1120. 1 Blac. Rep. 197. 3 Wilf. 51.

pleaded,

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pleaded, there must be an affidavit, stating that the lands are holden of a manor, which is antient demesne; that there is a court of antient demesne, regularly holden; and that the lessor of the plaintiff has a freehold interest^k.

In *transitory* actions, it is said^l, the defendant cannot plead to the jurisdiction of the court, unless the plaintiff by his declaration shew, that the cause of action accrued within a county palatine. And even then, it must be averred in the plea, either that the defendant dwells in the county palatine, or that he hath sufficient goods and chattels there, by which he may be attached; otherwise the plea cannot be allowed, lest a failure of justice should ensue^m: and the defendant cannot in such case demur to the declarationⁿ, or move in arrest of judgment^o.

Of a nature very similar to pleading to the jurisdiction of the court, is claiming *Consuance*^p; or praying, that the cause may

^k 2 Bur. 1046.

^o Carth. 11. Comb. 30,

^l 4 Inst. 212, 213. 1 Sid. 48. S. C. and see Comb. 103. Carth. 109. Gilb. C. 115.

P. 191. 1 Bac. Abr. 560. ^p Gilb. C. P. 191. 1 Bac.

^m Carth. 355.

Abr. 560. 1 Rol. Abr.

ⁿ Id. 354. 5 Mod. 144. 489.

S. C.

be determined before an inferior jurisdiction: concerning which, it will be proper to consider the several sorts of inferior jurisdictions; in what cases conusance may be claimed; and the time and manner of claiming it.

There are three sorts of inferior jurisdictions⁹. The first is to *hold pleas*, which is merely a concurrent jurisdiction; and can neither be claimed nor pleaded. The second is a *general conusance* of pleas; which, being intended for the benefit of the lord, may be claimed by him, though it cannot be pleaded by the defendant. The third is *conusance* of pleas, with *exclusive* words; as where the king grants to a city, that the inhabitants shall be sued within the city, *and not elsewhere*: This, being an *exempt* jurisdiction, may be either claimed or pleaded¹. Hence it is a general rule, that wherever the defendant can plead to the jurisdiction of the court, there the lord of the franchise may claim conusance, but not *vice versa*².

⁹ Palmer, 456. Hardr. Tit. *Conusance*, 589.
 509. 2 Ld. Raym. 836. 1 Bro. Tit. *Conusance*, 52.
 Salk. 148. 3 Salk. 79. 1 Blac. Rep. 197.
 12 Mod. 643. S. C. *Id.* 666. 2 Gilb. C. P. 193.
 10 Mod. 126. Vin. Abr.

The privilege of claiming conuſance is confined to courts of record^t, and *local* actions^u; except where the defendant is a member of the University of *Oxford* or *Cambridge*^v. And it is alſo confined to ſuch actions as were in *efſe* at the time of the grant^w, and does not extend to thoſe created ſince, by act of Parliament; except where a common law action is given againſt a perſon by another name, as *debt* againſt an adminiſtrator^x. Neither ſhall this privilege be allowed, where the franchise cannot give a remedy^y, and there would conſequently be a failure of juſtice^z; as in replevin^a, *quare impedit*^b, waſte, &c. or where the lord is a party, and the plea is to be holden before himſelf^c, or the defendant is a ſtranger, who hath nothing within the franchise^d; or laſtly, where the plaintiff is a privileged perſon, as an attorney or officer of the court^e. But

^t 2 Inſt. 140.^b Dalis. 12.^u 4 Inſt. 213. 1 Sid. 103.^c 8 Hen. VI. 18, 19, 20,^v Gilb. C. P. 193. 1 Bac.

21. Hob. 87.

Abr. 560.

^d 22 Aff. 83. 1 Rol.^w 14 Hen. IV. 20. b.

Abr. 493.

^x Id. 22 Ed. IV. 22.^e 3 Leon. 149. Lit. Rep.^y 2 Vent. 363.304. Vin. Abr. Tit. *Conu-*^z Hardr. 507.*ſance*, 592. Bendl. 233. *cont.*^a 2 Inſt. 140.

conusance may be claimed by a defendant, in custody of the marshal ^f.

Conusance of pleas must be claimed after appearance ^g, and before imparlance ^h, in the first instance, or on the very first day the party hath in court; even upon the return day of the writ, if the cause of action appear therein: if not, then upon the first day given upon the declaration ⁱ. As for instance, in *trespass* by original, where place is named, or *precipe quod reddat*, where land is demanded, conusance must be claimed upon the return day of the writ; because in these cases, the writ states where the cause of action arises ^k. But in *debt* or *detinue* 'tis otherwise: for it does not appear, till the plaintiff has counted, where the contract or obligation was made; and therefore till then, the lord need not make his claim ^l. So in *replevin*, the place where the cattle were taken does not appear, till the plaintiff has counted, if it be between strangers: but if a *replevin* be sued against the

^f Bro. tit. *Conusance*, 50. 411. Vin. Abr. Tit. *Conusance*, 590. Gilb. C. P. 195.

^g Comb. 319.

196.

^h 1 Sid. 103. 1 Shew. 352. 10 Mod. 125. 1 Barnardist. K. B. 66. 2 Willf.

ⁱ 2 Willf. 413.

^k 5 Bur. 2823.

^l 10 Mod. 127.

lord of the franchise himself, there the lord's claim would come too late after the count; because the law intends, that he knew the place of taking, being himself a party, and so, by not demanding his privilege on the writ, he gives the court seisin of the cause: for the lord must use no delay^m.

As to the manner of making the claim, it is holden, that conusance may be claimed by the lord of the franchise in person, or by his bailiff or attorneyⁿ: If it be claimed by attorney, the warrant of attorney must be produced in court, and filed^o. The grant of conusance must also be produced^p, or an exemplification of it under the great seal^q; and if the grant was before time of memory, an allowance must be shewn in the King's Bench, or before justices in *Eyre*^r. Upon a claim made by the University of *Oxford* or *Cambridge*^s, there must be likewise, in addition to the grant, an exemplification of the statute

^m 5 Bur. 2823.

^r Keilw. 189, 190. 1 Sid.

ⁿ Bro. Tit. *Conusance*, 50.

103. 1 Salk. 183. 1 Ld.

12 Mod. 644. 666.

Raym. 427, 8. 475. S. C.

^o Palm. 456. 1 Sid. 103.

Gilb. C. P. 195. but see

1 Lev. 89.

Bro. tit. *Conusance*, 51.

^p 12 Mod. 644. 1 Blac.

^s 10 Mod. 126. 1 Blac.

Rep. 454.

Rep. 454.

^q 5 Bur. 2820.

confirming it^t; together with an affidavit of the defendant's residence^u. The claim itself must be entered upon a roll^v; and, after stating the several proceedings that have been had in the cause, must set forth the grounds upon which it is made, with great precision^w. It may be demurred to; or the facts therein alledged may be controverted by pleading^x. If allowed, a day is given, upon the roll, for the lord of the franchise to hold his court; and the parties are commanded to be there on that day^y. But the record still remains in the court above; and a transcript only is sent down to the court below^z: So that if justice be not done there, as if the defendant be a stranger, and has nothing within the franchise, by which he can be summoned, or if the judge misbehave himself, &c. the plaintiff shall have a re-summons^a, upon the record in the court above. And

^t 13 Eliz. c. 29.

^x Id. Comb. 319.

^u 1 Barnardist. K. B. 49.

^y 2 Ld. Raym. 836, 7.

65. 2 Str. 810. 2 Wilf.

311. 1 Blac. Rep. 454.

5 Bur. 2820.

12 Mod. 644. 3 Salk. 79.

S. C.

^z Id. Jenk. 31.

^v Comb. 319. 1 Barnardist. K. B. 65.

2 Str. 810.

^a Id. Hardr. 407. but see

Vin. Abr. tit. *Conusance*,

^w 2 Wilf. 409, 10.

589. 10 Mod. 127.

if a re-summons issue, upon failure of right in a franchise, the lord of the franchise shall never afterwards have conusance of that plea ^b.

Pleas in abatement, to the person of the *plaintiff*, are either that he is not in existence, (being only a fictitious person ^c, or dead ^d;) or else that, being in existence, he is an alien enemy ^e, attainted of treason or felony ^f, outlawed upon mesne or final process ^g, under a *præmunire* ^h, excommunicated ⁱ, or convicted of popish recusancy ^k. Where the cause of action is forfeited, as by the plaintiff's being an alien enemy ^l, attainted ^m, or outlawed for felony ⁿ, there his disability may be pleaded in abatement or in bar; but otherwise it can only be pleaded in abatement.

Pleas in abatement, to the person of the *defendant*, are that he is privileged, as an attor-

^b Jenk. 34.

^h Co. Lit. 129. b.

^c Ast. Ent. 10. 3 Inst. Cl. 89.

ⁱ Lutw. 17. 3 Inst. Cl. 18.

^d Ast. Ent. 8. 3 Inst. Cl. 75, &c.

^k 3 Inst. Cl. 20. 1 Str. 520.

^e Lutw. 34. 3 Inst. Cl. 16.

^l Co. Lit. 129. b.

^m Bro. V. M. 252.

^f Carth. 137, 8.

ⁿ Co. Lit. 128. b. Gilb. C. P. 200.

^g Lutw. 6, 1529. 3 Inst. Cl. 23, &c.

ney or officer of the court^o; under the king's protection^p; or an infantⁱ, when sued as heir on the obligation of his ancestor, &c.; in which latter case, the *parol* shall demur, or proceedings be stayed, till he come of age. Under the head of pleas to the person, may also be included *Coverture*, in the plaintiff^r or defendant^s; or that the plaintiffs or defendants, suing or being sued as husband and wife, are not married^t; or any other plea for want of proper parties, as that there is an executor^u, administrator^v, or other person^w, not named, who ought to be made a co-plaintiff or co-defendant.

There is a distinction, with regard to co-plaintiffs, between torts and contracts: for if an action be brought for a tort, by one of several joint-tenants or tenants in common, the defendant must plead in abatement; and cannot take advantage of it in evidence, upon the general issue^x. But if an action be brought upon a joint contract, by one of several part-

^o 1 Lutw. 639.

^p 3 Inst. Cl. 51. Rastal,

^p 2 Bro. Ent. 106.

325. a.

^q Rastal, 360, 362, 379.

^v 3 Inst. Cl. 53. Rastal,

Bro. R. 195.

324.

^r Ast. Ent. 9. 3 Inst. Cl.

^w 3 Inst. Cl. 53, 119.

70.

1 Lutw. 696.

^s 1 Lutw. 23. 3 Inst. Cl.

^x 1 Salk. 32, 290. 2 Str.

71.

820.

^t 3 Inst. Cl. 69.

ners,

ners, the plaintiff must be non-suited or have a verdict against him ^y. A similar distinction was formerly observed, with regard to co-defendants ^z: but it is now clearly settled ^a, that if an action be brought upon a joint contract, against one of several partners, the defendant can only plead it in abatement; though the plaintiff knew, and even contracted with the other partners.

Pleas in abatement of the *count* can only be pleaded in actions by original writ; and are for some uncertainty, repugnancy, or want of form ^b, not appearing on the face of the writ, or else for some variance therefrom ^c.

Pleas in abatement of the *writ* are, either for matter apparent on the face of it, or for matter *dehors* ^d, existing at the time of suing out the writ, or arising afterwards ^e. To the *form* of the writ they are, for some apparent uncertainty, repugnancy, or want of form ^f;

^y 2 Str. 820.

^b 3 Inst. Cl. 62.

^z 2 Mod. 279. 3 Mod.

^c Reg Pl. 277, 8.

321. 2 Salk. 440. Show.

^d Gilb. C. P. 51.

29, 101. 3 Lev. 258. Carth.

^e See Com. Dig. tit. A-

58. S. C. Gilb. Evid. 189.

batement, (H.)

^a 2 Atk. 510. 5 Bur.

^f Lutw. 25. 3 Inst. Cl.

2611. 2 Blac. Rep. 947.

49, 54, 66, &c.

variance^s from the record, specialty, &c.; *misnomer*^h of the plaintiff or defendant; or, in actions by original writ, the omission or mistake of the defendant's *addition*ⁱ; that is, of his estate, degree, mystery, or place of abode. But the plaintiff may sue the defendant, either by the addition of his degree or mystery^k; and may name him of the place where he *lately* dwelt^l.

Pleas in abatement to the *action* of the writ are, that the action is misconceived^m; or was prematurely brought, before the cause of it aroseⁿ; or that there is another action depending for the same cause^o. It is said, in one case^p, that the pendency of a prior action for the same cause may be pleaded in bar to a second action; but it cannot be pleaded in abatement. This however must be understood with reference to the particular case of

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| ^s 3 Inst. Cl. 43, &c. | 1541. S. C. |
| ^h Lutw. 10. Aft. Ent. 1. | ⁱ 2 Str. 924. |
| 3 Inst. Cl. 79, &c. but see 2 | ^m 3 Inst. Cl. 120, &c. |
| Str. 1218. | ⁿ Lutw. 8, 13. 3 Inst. Cl. |
| ⁱ Stat. 1 Hen. V. c. 5. 3 | 56. Fortes. 334. |
| Inst. Cl. 92. | ^o Lutw. 33. 3 Inst. Cl. |
| ^k 8 Mod. 51, 52. 1 Str. | 111. |
| 556. 2 Str. 816. 2 Ld. Raym. | ^p Say. Rep. 216. |

a qui

a *qui tam* action, and not as a general rule applicable to all cases.

The general requisites of a plea in abatement are, that it should be certain to every intent^a, give the plaintiff a better writ^r, and have an apt and proper beginning and conclusion: for it is the beginning and conclusion that make the plea^s. Pleas to the jurisdiction of the court must be pleaded in *person*^r; and in pleading them, the defendant must make but *half* defence^u: but pleas in abatement may be pleaded by *attorney*, and with *full* defence^v. Where the defendant pleads to the writ, for matter *apparent* he should begin his plea, by praying judgment of the writ, and conclude it in the same manner^w; but where the plea is for matter *dehors*, as joint-tenancy, non-tenure,

^a Co. Lit. 303. a. Cro.	^r Gilb. C. P. 187.
Jac. 82. 3 Lev. 67.	^u Id. 188. Co. Lit. 127.
^r Brownl. 139.	^v Lutw. 7 <i>Wheatley v.</i>
^s 1 Sid. 189. 1 Ventr.	<i>Cudmerston, M.</i> 15 Geo. 2.
136. Comb. 106, 7. 1	<i>C. P. Thompson v. Stockdale,</i>
Show. 4. S. C. 1 Ld. Raym.	<i>H.</i> 23 Geo. 3. K. B.
593. 1 Salk. 210. S. C. 12	^w Moor, 30. Dalis. 33.
Mod. 525. 10 Mod. 112,	S. C. Reg. Pl. 273. Lutw.
192, 210.	11. 12 Mod. 525.

or the like, there he should conclude it only in this manner ^x. A plea of misnomer of the defendant, beginning, "*And the said Richard, sued by the name of Robert, &c.*" is bad ^y. In pleading to the jurisdiction, the defendant should conclude his plea, by praying judgment, *if the court will take further cognizance of the suit* ^z. In pleading to the person, the conclusion is, *whether the defendant ought to answer, or the plaintiff to be answered* ^a; or if excommunication, or other temporary disability, be pleaded, *that the plaint may remain without day, until, &c.* ^b In pleading to the writ or count, if the action be by *original*, the plea should conclude, by praying judgment of *the writ or count, and that the same may be quashed* ^c. But if the action be by *bill*, the plea should conclude, by praying judgment of *the bill, or of the bill and declaration*, (for they are the same thing), and not of the *declaration* only ^d. A plea of misnomer, praying judgment *if the bill, and that the same may be quashed*, is ill on special demurrer ^e.

^x Same Cases.

3 Inst. Cl. 18. 1 Str. 521.

^y 5 T. R. 487.^c 5 Mod. 132.^z Latch, 78.^d *Id.* 5 Mod. 144. 12^a *Id. ibid.* Lit. § 195, Mod. 133. S. C. 10 Mod. 192, 210.

&c.

^b 3 Lev. 240. Lutw. 19.^e 3 T. R. 185.

Pleas to the jurisdiction of the court ^f, (except antient demesne ^g,) and pleas in abatement ^h, ought to be pleaded before a general imparlance, within four days *inclusive* ⁱ after the delivery, or filing and notice, of the declaration ^k; unless the declaration be delivered or filed after term, or so late in the term, that the defendant is not bound to plead to it that term; in both which cases, the defendant may, within the first four days *inclusive* of the next term, plead to the jurisdiction of the court, or in abatement, as of the preceding term ^l. But if such plea be not delivered, or left in the office, within that time, it is not

^f Dyer, 210. b. *in margine*,
T. Raym. 34. 1 Keb. 137.
S. C. Gilb. K. B. 317, 344.
Gilb. C. P. 183, 184, 187.
4 Bac. Abr. 28, 9.
^g Dyer, 210. b. *in margine*,
Latch. 83. Cro. Car. 9.
Sty. Rep 90. Vin. Abr.
tit. *Conusance*, p. 591.
^h 2 Keb. 143. 1 Mod.
14. 1 Ventr. 184. 1 Lutw.
23. Sty. P. R. 465. Gilb. K.
B. 344. R. E. 5 Ann. (a)
R. T. 5 & 6 Geo. 2. (b) 1
Str. 523. Barnes, 224, 334.
ⁱ 1 T. R. 277. 5 T. R. 210.
^k 11 Mod. 2. 2 Str. 1192.
1 Wilf. 23. S. C. 2 Str.
1268. 1 T. R. 277, 689.
And see Gilb. C. P. 52.
Pr. Reg. 3. Caf. C. P. 23. S.
C. Pr. Reg. 286. Caf. C. P.
63. S. C. But see Sty. P. R.
458, 468. R. E. 5 Ann.
(a) 1 T. R. 278, 9. from
whence it should seem, that
they ought to be pleaded,
before the rule for pleading
is expired.
^l 1 Salk. 367. Gilb. K. B.
344, 5.

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to be received; whether a rule to plead be given or not^m. And *Sunday*, or any other day on which the court does not sit, is to be accounted as one of the four days, unless it happen to be the lastⁿ.

Before the statute for the amendment of the law, where the defendant pleaded a *foreign* plea, he was obliged to verify it by affidavit^o. And now, by that statute^p, "No *dilatory* " plea shall be received in any court of re- " cord, unless the party offering such plea do, " by affidavit, prove the truth thereof; or " shew some probable matter to the court, to " induce them to believe, that the fact of such " dilatory plea is true." The affidavit, re- quired by this statute, may be made by the defendant himself, or a third person^q; and as the statute only requires probable cause, there does not seem to be any necessity for an affi- davit, where the plea is for matter apparent, as want of addition^r, &c. Yet where the defendant pleaded, after oyer of the original, that it was not returned, the court set aside

^m 1 Lil. P. R. 3. R. E. Rep. 435. Carth. 402. 5
5 Ann. (a) 1 T. R. 278, 9. Mod. 335. S. C.

ⁿ R. E. 5 Ann. (a) 1 T. P. 4 & 5 Ann. c. 16. § 11.
R. 279. 3 T. R. 642. 5 Pr. Reg. 6. Barnes, 344.
T. R. 210. S. C.

^o 2 Lil. P. R. 299. Sty. Pr. Reg. 5.

the plea, for want of an affidavit of the truth of it ^s.

A plea in abatement should be signed by counsel; and filed in the office of the clerk of the papers, with an affidavit that the plea thereto annexed is true in substance and matter of fact ^t. And if it be not filed in due time, the plaintiff may consider it as a mere nullity, and sign judgment ^u. If there be no affidavit annexed, the plaintiff must move the court to set it aside ^v.

When a plea in abatement is regularly put in, the plaintiff must reply to it, or demur. If he reply, and an issue *in fact* be thereupon joined, and found for him, the judgment is *peremptory*, *quod recuperet* ^w; but if there be judgment for the plaintiff, on *demurrer* to a plea or replication in abatement, the judgment is only *interlocutory*, *quod respondeat ouster* ^x. In the latter case, the defendant has in general four days time to plead; but this is in the discretion of the court ^y, and they will sometimes order him to plead *instante*,

^s 1 Str. 639. 2 Ld. Raym. 19, 293. 3 Bur. 1617.
1409. S. C. ^w Gilb. C. P. 53. 2 Wils.
^t Str. 705, 738. 367.
^u 1 T. R. 277, 689. 5 T. ^x *Id. ibid.*
R. 210. ^y Comb. 19.
^v 1 Str. 638. Say. Rep.

or on the morrow. After a judgment of *respondeat ouster*, it is said, there can be no plea in abatement; for if it were allowed, there would be no end of such pleas^z. But this must be understood of pleas in abatement *in the same degree*, as popish recusancy and outlawry^a, being both to the person: for the defendant may plead to the person of the plaintiff, and if that be over-ruled, he may afterwards plead to the form of the writ^b.

The judgment for the *defendant*, on a plea in abatement, whether it be on an issue in *fact* or in *law*, is, *that the writ or bill be quashed*^c; or, if a temporary disability or privilege be pleaded, as excommunication, or the king's protection, infancy, &c. *that the plaint remain without day, until, &c.* On an issue in fact, the defendant is intitled to *costs*; but not on an issue in law^d.

^z 4 Bac. Abr. 51. Gilb. *ment*, p. 66. cites Th. D. 1. C. P. 186, 2 Saund. 40, 41. x. c. 1.

¹² Mod. 230.

^c Gilb. C. P. 52.

^a Hetl. 126.

^d 2 Ld. Raym. 992.

^b Com. Dig. tit. *Abate-*

C H A P. XXV.

Of Oyer, and inspecting Books, &c.

PREVIOUS and preparatory to pleading in bar, the defendant may crave oyer of deeds, &c. or claim inspection of books, court rolls, &c. or he may move the court to change the venue, consolidate unnecessary actions, or strike out superfluous counts.

Oyer of deeds, &c. is demandable by the plaintiff, or by the defendant. If the plaintiff in his declaration *necessarily* make a *profert in curiâ* of any deed, writing, letters of administration, or the like, the defendant may pray oyer, and must have a copy thereof delivered to him, if demanded; paying for the same after the rate of four-pence per sheet, and also for the stamps^a. So likewise if the defendant in his plea make a necessary *profert in curiâ* of any deed, &c. the plaintiff may pray oyer, and shall have a copy, at the like rate^b. And the party, of whom oyer is demanded, is bound to carry it to the adverse

^a 2 Salk. 497. R. T. 5 & 6 Geo. 2. (b) ^b *Id.* 6 Mod. 122.

party.

party^c. Formerly, all demands of oyer were made in court, where the deed is, by intendment of law, when it is pleaded with a *profert in curiâ*^d: And therefore, when oyer is craved, it is supposed to be of the court, and not of the party; and the words *ei legitur in hac verba*, &c. are the act of the court^e. In practice however, oyer is now usually demanded, and granted by the attornies^f. And where the plaintiff is intitled to have oyer of a deed, it cannot be dispensed with by the court; nor can the defendant be compelled to plead without it^g, even though the deed be lost. But where the deed is in the hands of a third person, the court will oblige him to give oyer, and produce it^h.

When a deed is shewn in court, it remains there, in contemplation of law, all the term in which it is shewn; for all the term is considered in law but as one day. And at the end of the term, if the deed be not denied, the law doth adjudge it to be in the custody

^c 2 T. R. 40.

^e Lil. P. R. tit. Oyer,

^d 12 Mod. 598. 3 Salk. 119.

2 V. 266. 2 Keb. 274.

6 Mod. 28. 2 Str. 1186.

^e Id. 1 Sid. 108. but see

1 Wilf. 16. S. C.

2 Lutw. 1644. *contra*.

^h 2 Str. 1198.

^f 6 Mod. 28.

of the party to whom it belongs; but if it be denied, then it shall remain in court till the plea is determined; and if it eventually turn out not to be the plaintiff's deed, it shall be destroyedⁱ. But letters testamentary, or of administration, are not supposed to remain in court all the term; for the plaintiff may have occasion to produce them elsewhere^k. Hence it is, that oyer of a deed cannot in strictness be demanded, but during the same term it is pleaded^l. And as a general imparlance is always to a subsequent term, it follows, that oyer of a deed cannot be demanded after such imparlance^m. A different doctrine is indeed laid down in one caseⁿ, which must be understood of a *special* imparlance, to another day in the same term.

Though oyer is not in strictness demandable of a *record*^o, yet if a judgment or other matter of record in the *same* court be pleaded,

ⁱ Co. Lit. 231. b. 5 Co. 480, 491. S. C. 6 Mod. 74. b. 2 Lutw. 1644. 28.

^k 2 Saik. 497. 12 Mod. 598. S. C. ⁿ 12 Mod. 99. and see 2 Show. 310.

^l 5 Co. 74. b. 2 Lutw. 1644. 1 T. R. 149. ^o 1 Ld. Raym. 347. (4th edit. note a.) Doug. 476,

^m 1 Keb. 32. 2 Lev. 7. 1 T. R. 149, 50.

142. Freem. 400. 3 Keb.

the party pleading it must give a note in writing, of the term and number roll, whereon such judgment or matter of record is entered and filed; or in default thereof, the plea is not to be received^p. And, probably on this account, the party was not antiently permitted to plead *nul tiel record*, of a judgment or matter of record in the *same* court^q. But where a judgment or matter of record is pleaded in a *different* court, the party, not being intitled to an account of the term and number roll, must plead *nul tiel record*. And it seems, that oyer is not demandable of an act of parliament^r.

Formerly, the defendant was allowed oyer of the original writ, in order to demur or plead in abatement, for any apparent insufficiency or variance^s. But this indulgence having been abused, and made an instrument of delay, it is now holden, that if the defendant demand

^p Keilw. 96. Carth. 454.

¹ Ld. Raym. 347. Carth.

517. ¹ Ld. Raym. 550. ²

Str. 823. R. T. 5 & 6

Geo. 2. (b)

^q 5 Hen. 7. 24. *per*

Brian. 3 Keb. 76.

^r Doug. 476. Godb. 186.

contra.

^s Gilb. C. P. 52. 12

Mod. 35, 189. ² Lutw.

1644. 6 Mod. 27. ² Salk.

498. ² Ld. Raym. 970.

R. T. 5 & 6 Geo. 2. b. ²

Will. 97. Co. Ent. 320.

oyer of the original writ, the plaintiff may proceed, as if no such demand had been made ^t.

The demand of oyer is a kind of plea ^u; and should regularly be made, before the time for pleading is expired ^v. If it be not made till after that time, the plaintiff may consider the demand as a nullity, and sign judgment. But though oyer be not in strictness demandable, yet if it be given, the party demanding has a right to make use of it ^w. If the defendant would insist upon his demand of oyer, he should move the court to have it entered upon record ^x; if the plaintiff, on the other hand, would contest the oyer, he may either counterplead it ^y, or strike out the rest of the pleading, and demur ^z; upon which the judgment of the court is, either that the defendant have oyer, or that he answer without it ^a: on the latter judgment, the defendant may bring a writ of error; for to deny oyer

^t Doug. 227, 8. Barnes
340. and see Bro. Abr. tit.
Oyer, pl. 19.

^u 3 Salk. 119.

^v *Fowler and Dyer*, M. 20 Geo. 3.
Ld. Raym. 970.

^w Doug. 476, 7.

^x 6 Mod. 28.

^y 2 Lev. 142.

^z 2 Salk. 497. and see ^z

^a 2 Lev. 142.

where

where it ought to be granted is error, but not *é converso* ^b.

There is no settled time prescribed for the plaintiff to give oyer; though if not given when demanded, the defendant shall have the same time to plead, after oyer given, as he had at the time of demanding it ^c. And he may either set forth the oyer in his plea or not, at his election ^d. If he set it forth, the court must adjudge upon it, as parcel of the record; though it was not strictly demandable, at the time of granting it ^e. But the defendant is not bound to set it forth in his plea ^f: and if he do not, the plaintiff may pray an inrolment, and so make it part of his replication.

The time allowed for the defendant to give oyer of a deed, &c. to the plaintiff, is *two* days exclusive after it is demanded ^g. And if it be not given in that time, the plaintiff may sign judgment, as for want of a plea ^h. If

^b 2 Salk. 497. 6 Mod. 28. 2 Ld. Raym. 970. S. C. 2 Str. 1186. 1 Wils. 16. S. C.

^c 1 Str. 705. R. T. 5 & 6 Geo. 2. (b)

^d 2 Str. 1241. 1 Wils. 97.

^e 3 Salk. 119. Carth. 513. 6 Mod. 27. Doug. 460.

^f 2 Str. 1241. 1 Wils. 97. Barnes, 127. *contra*.

^g Carth. 454. 2 T. R. 40.

^h 6 Mod. 122.

given,

given, the plaintiff shall have the same time to reply, after oyer given him by the defendant, as he had at the time of demanding it ⁱ.

The general rule, with regard to the inspection of books, court-rolls, &c. is, that a party has a right to inspect, and take copies of such as are of a *public* nature, wherein he has an interest, so as they be material to the suit, and the party in possession be not obliged to furnish evidence against himself, in a criminal prosecution ^k. And if the books, &c. are not evidence of themselves ^l, or appear on inspection to have been altered, by erasure ^m, &c. the court will order them to be produced at the trial.

The books of the *Sessions* are considered as public books, which every one has a right to inspect ⁿ. And every man has a right to inspect the proceedings, to which he himself is

ⁱ R. T. 5 & 6 Geo. 2. (b)

^k 1 Blac. Rep. 44.

^l 1 Str. 126. Barnes, 468.

^m 1 Str. 307. Say. Rep. 76.

ⁿ 1 Willf. 297. *Rex v. Berking*, cited in 1 Willf. 240. 1 Blac. Rep. 39. S. C.

a party^o; for he has an interest in such proceedings. But it is a rule, that no person shall be compelled to produce, or give copies of books, &c. of a *private* nature^p. Thus the *East-India* Company, though they are compellable to produce their public books^q, are not obliged to produce their books of letters^r, &c. nor their private books, relating to the appointment of their servants^s. And a mere stranger, or one who has no interest in the books, &c. is not intitled to inspect or take copies of them^t.

The *Court rolls* and books of a manor are of a public nature, the tenants have an interest therein, and the lord who has the custody of them is considered merely as a trustee^u. Hence it is of course, to grant leave to inspect the court rolls, &c. of a manor, on the application of a tenant of the manor, who has been refused that permission by the lord^v.

^o Caf. temp. Hardw. 128. ^q 7 Mod. 129. 2 Ld.
2 Str. 1242. Barnes, 236. Raym. 851. S. C.
But see 1 Ld. Raym. 252. ^r 1 Str. 646.
Gilb. Caf. B. R. 134. (Dr. ^s 2 Str. 717.
West's Case) 2 Str. 1005. ^t Id. 1005. 1 Wils. 240.
1 Wils. 240. 1 Blac. Rep. 1 Blac. Rep. 40. S. C.
41. S. C. cited. Say. Rep. ^u 2 Str. 955, 1005.
250. *semb. contra.* ^v 3 T. R. 141. and see
 ^p 2 Lord Raym. 927. Barnes, 236. 2 Blac. Rep.
Barnes, 236. 1061. *accord.*

But

But this privilege is confined to the tenants of the manor: for the lord or tenants of a different manor, having no interest in the court rolls, &c. cannot claim the inspection of them^w. And, in one case, a *freeholder* was refused a rule to inspect the rolls of the manor, in a case between himself and the lord, touching a *copyhold*^x.

So the books of a *Corporation* are in nature of public books^y; and every member of the corporation, having an interest therein, has a right to inspect and take copies of them, for any matter that concerns himself, though it be in a dispute with others^z. And in an action brought by a corporation for toll, against the defendant, who was not a member of the corporation, the court, on his application, have, in several recent instances, granted a rule for inspection of such parts of the deeds, &c. as related to the matter in dispute^a; which rule has been directed to the town clerk, requiring him to give the inspection upon oath: for the

^w 12 Vin. 146. 2 Str. 2 2 Str. 1223. Barnes, 235.

1005. 3 T. R. 142. ^a 1 T. R. 689. 3 T. R. 303.

^x 1 Will. 104. but see but see 5 Mod. 395. 1 Ld.

Barnes, 237. 2 Blac. Rep. Raym. 337. S. C. 2 Str.

1030. *semb. contra.* see also 1203. Barnes, 238. 3 Will.

2 Vez. 620. 398. 2 Blac. Rep. 877.

^y 2 Str. 954, 5. S. C. *semb. contra.*

defendant, in such case, has an interest in the deeds, &c. though distinct from that of the corporation; and the foundation of the rule is, that as the court of chancery would order inspection, merely for asking^b, this court will do the same thing, to save expence to the parties^c. But in this, as in all the other cases, the inspection is confined to the subject matter in dispute^d: and these rules of inspection, in cases of copyholds, corporations, &c. are never granted, but only where *civil* rights are depending^e; for it is a constant and invariable rule, that in *criminal* cases, the party shall never be obliged to furnish evidence against himself^f.

If a rule be made to shew cause why an information should not be filed, the court will make a rule for the prosecutor to inspect and take copies of books and records, as soon as the rule to shew cause is granted^g: but if a rule be made to shew cause why a *mandamus*

^b 2 Vez. 620.

Ld. Raym. 927. 2 Str.

^c 1 T. R. 689. 3 T. R. 303.

1210. 1 Will. 239. 1 Blac.

Rep. 37. S. C. Id. 351. S.

^d 2 Str. 1005, 1223. 1 Will. 239. 3 T. R. 303. but

P. 1 T. R. 689. 3 T. R. 142.

see 3 T. R. 579.

^e Cas. temp. Hardw. 245.^f 1 Will. 240.

Say. Rep. 145. but see 3

^g 1 Ld. Raym. 705. 2

T. R. 581.

should

should not be awarded, the court will not make a rule for the prosecutor to inspect and take copies of books and records, until the rule is made absolute, and a return is made to the *mandamus*^h. And in an action against a corporation, upon a right of toll, the court refused a rule to inspect the public books, records, and writings of the corporation; because no issue was yet joined, so that it could not appear whether such inspection would be necessaryⁱ.

^h Say. Rep. 145. 1 Ld. Willf. 398. S. C. 1 Ld. Raym. 253. *accord.* Raym. 253. *accord.*

ⁱ 2 Blac. Rep. 877. 3

C H A P. XXVI.

Of Changing the Venue, Consolidating Actions, and Striking out Counts.

THE law having settled the distinction between *local* and *transitory* actions, it seems that, towards the reign of *Rich. II.* this distinction was but little attended to^a; for a litigious plaintiff would frequently lay his action in a foreign county, at a great distance from where the cause of it arose, and by that means oblige the defendant to come with his witnesses into that county. To remedy which, it was ordained by statute^b,
 “to the intent that writs of debt and account, and all other such actions, be from henceforth taken in their counties, and directed to the sheriffs of the counties where the contracts of the same action did arise; that if from henceforth, in pleas upon the same writs, it shall be declared, that the contract thereof was made in another county, than is contained in the original writ,

^a Gilb. C. P. 89.^b 6 R. 2. c. 2.

“ that

“that then incontinently the same writ shall be utterly abated.” The design of this statute was to compel the suing out of all writs arising upon contract, in the very county where the contract was made^c; agreeably to the law of Henry the First^d, *Unusquisque per pares suos judicandus est, et ejusdem provinciae; peregrina vero judicia modis omnibus submovemus*^e. But as the statute only prescribes, that the count shall agree with the writ, in the place where the contract was made, it did not effectually prevent the mischief^f: and therefore a statute of Henry the Fourth^g directs all attornies to be sworn, that they will make no suit in a foreign county; and there is an old rule of court^h, which makes it highly penal for attornies to transgress this statute.

Soon after the statute of Henry the Fourth, a practice began of pleading in abatement of the writ, the impropriety of its venue, even before the plaintiff had declaredⁱ. At first, in the reign of Henry the Fifth, they examined the plaintiff upon oath, as to the truth of his venue. But soon after, they began to

^c 2 Blac. Rep. 1032.

^g 4 Hen. IV. c. 18.

^d Leg. Hen. 1. c. 31.

^h R. M. 1654. § 5.

^e Gilb. C. P. 89. *in notis*.

ⁱ 2 Blac. Rep. 1033.

^f 2 Blac. Rep. 1032.

allow the defendant to traverse the venue, and to try the traverse by the country^k. This practice being subject to much delay, the judges introduced the present method of changing the venue upon motion, on the equity of the above statutes; which Lord *Holt* says^l, began in the time of *James* the First. And accordingly we find, that among the fees of this court, as found by a jury, under the king's commission, in 1630, one is, "for every rule to alter a *visne* ^m." The form of the rule and affidavit are also stated by *Styles*ⁿ, as established in 23 *Car.* 1.

But whenever the practice began, it is now settled, that in *transitory* actions, the venue may be changed upon motion, either by the plaintiff or defendant. The plaintiff shall not *directly* alter his venue after the effoign day of the next term after appearance; though he would pay costs, or give an imparlance^o. Yet he may in effect do it, by moving to amend^p; and that, after the defendant has changed the venue^q, or pleaded^r, and even

^k Raftal; tit. *Debt*, 184. (b.) ^o Sty. P. R. 625. R. M. Fitz. Abr. tit. *Brief*, 18. 10 Geo. II. reg. 2. (c)

^l 2 Salk. 670.

^p 2 Str. 1162.

^m Trye's *jus fil.* 231.

^q 2 Str. 1202.

^r Sty. P. R. (ed. 1707.)

^s 1 Will. 173.

after two terms have elapsed from the delivery of the declaration^s.

The defendant is, in general, allowed to change the venue in all *transitory* actions, arising in a county different from that where the plaintiff has laid it; and he may even change it from *London* to *Middlesex*^t, or *vice versa*^u. But the venue cannot be changed in *local* actions^v. And in transitory actions, where material evidence arises in two counties, the venue may be laid in either^w: And if it be laid in a third county, the court will not change it; for the plaintiff in such case cannot make the necessary affidavit, that the cause of action arose in a particular county, and not elsewhere. Thus, where the venue was laid in *London*, and it appeared, from the affidavit, that the cause of action arose upon a bridge called *King's-bridge*, partly in the county of *Kent*, and partly in the county of the city of *Canterbury*, and not elsewhere, the court refused to change the venue^x.

From what has been said it appears, that, in order to change the venue, it is indispensibly

^s Say. Rep. 150. 294.

^t 2 Str. 857.

^u 2 T. R. 275.

^v Say. Rep. 146.

^w 2 Salk. 609. R. M. 10 Geo. II. reg. 2. (c) 2 T. R.

275.

^x 1 Will. 178.

necessary that the cause of action should be *wholly* confined to a single county: And therefore, where that is not the case, the court will not change it. Thus in an action of debt on bond, or other specialty^y, the court will not change the venue, unless some special ground be laid^z; *for debitum et contractus sunt nullius loci*, and bonds and other specialties are *bona notabilia*, wherever they happen to be^a. In analogy to which, it is now holden^b, agreeably to the practice of the court of common pleas^c, that the venue cannot be changed in an action upon a promissory note, or bill of exchange. But the venue may still be changed, in an action upon a policy of insurance^d, nor being by deed; or in any other action, the right of which is founded upon simple contract^e.

^y 1 Keb. 65. 1 Sid. 87. *Precious v. Bennet*, E. 25
 Sty. P. R. 631. 2 Str. 878. Geo. 3. 1 T. R. 571. but
 Andr. 66. R. M. 10 Geo. see the opinion of the other
 2. (c) Gilb. K. B. 339. justices in Andr. 66. and 1
 Gilb. C. P. 90. *Balein v. Will* 41. Say. Rep. 7.
Kent, E. 20 Geo. 3. *contra*.
 Barnes, 491. ^e Barnes 480, 483, 485,

^z 1 T. R. 781.

487, 491, 2.

^a *Id.* 571.

^b Andr. 66. 2 Str. 1180.

^b Andr. 66. *per Chapple* Say. Rep. 7. 2 T. R. 275.
 Just. R. M. 10 Geo. 2. (c.) ^c Say. Rep. 7.

In

In an action for *scandalum magnatum*, the court will never change the venue^f; because a scandal raised of a peer of the realm is not confined to any particular county, but reflects on him through the whole kingdom; and he is a person of so great notoriety, that there is no necessity for obliging him to try his cause in the neighbourhood. So in an action for a libel, published in a newspaper in one county, and circulated in other counties^g, or contained in a letter, written by the defendant in one county, and directed into another^h, the court will not change the venue; because the defendant cannot make the common affidavit, that the cause of action arose in a single county, and not elsewhere: and, for a similar reason, the venue cannot be changed in an action against a carrier or lightermanⁱ, or for an escape^j, or false return^k. But in an action for a libel, the court will change the venue into a county, in which it was both written and published^l: And the distinction seems to be, between a

^f 1 Lev. 56. 2 Salk. 668.ⁱ 2 Salk. 670.

Carth. 400. S. C. 2 Str.

^j *Id.* 1 Keb. 65. 1 Sid. 87.

807. Barnes, 482. Gilb.

^k 2 Salk. 669. 2 Str.

C. P. 90.

727. Say. Rep. 54. 1 Will.

^g 1 T. R. 571.

336. S. C.

^h *Id.* 647.^l 3 T. R. 306.

libel which is dispersed through several counties, and a letter which is written in one county, and not opened in another; on the former, the venue cannot be changed, on the latter it may^m.

Though the court in general will not change the venue, where it is laid in the proper county, yet they will change it, even then, upon a special ground. Thus in debt on bond, where the venue was laid in *London*, and the plaintiff's and defendant's witnesses lived in *Lincolnshire*, the court changed it into the latter countyⁿ. And on the other hand, though the court will in general change the venue, where it is not laid in the proper county, yet if an impartial or satisfactory trial cannot be had there, they will not change it; as in an action for words spoken of a justice of the peace, by a candidate upon the hustings, at a county election^o.

So, where the venue is not laid in the proper county, the privilege of the plaintiff will in some cases prevent the court from changing it. Thus in an action brought by a bar-

^m 3 T. R. 652.

in notis.

ⁿ 1 T. R. 781. but see ^o Cowp. 510.

1 Will. 162. 1 T. R. 782.

risters^p, attorney^q, or other officer of the court^r, if the venue be laid in *Middiesex*, the plaintiff, suing as a privileged person, has a right to retain it there, on account of the supposed necessity of his attendance on the court. But if the venue be laid in any other county, as in *London*^s; or the plaintiff sue as a common person, by original or otherwise^t, or *en auter droit*, as executor or administrator, or jointly with his wife or other persons^u, he has no such privilege. And where a barrister, attorney, or other officer of the court is defendant, he has no privilege whatever, respecting the venue^v.

When the cause of action arises in an English county, where the assizes are regularly holden twice a year, it is a matter of course to change the venue into that county^w. But where the cause of action arises out of the

^p 2 Show. 176, 242. 1 ^s 2 Salk. 668.
Mod. 64. Sty. Rep. 460. ^t Pr. Reg. 419, 420.
2 Salk. 668. 2 Ld. Raym. Barnes, 479, 484.
1556. 2 Str. 822. 1 Wils. ^u R. M. 10 Geo. II.
159. 1 Blac. Rep. 19. reg. 2. (c.)
S. C. ^v Carth. 126. Show. 148.
^q 2 Salk. 668. Say. Rep. 4 Bur. 2027. Barnes 482.
153, 180. Barnes, 479. Pr. Reg. 419. but see 1
^r 2 Salk. 670. 2 Ld. Str. 610. 2 Str. 1049.
Raym. 1253. *contra*.
^w R. M. 1654. § 5.
realm,

realm, the court will not change the venue; because the action may as well be tried in the county where the venue is laid, as in any other, where the cause of action did not arise^x. And, in order to avoid delay, the court will not change the venue, except by consent, into a Northern county, where there are no Lent assizes, in *Michaelmas* or *Hilary term*^y; nor into *Hull*, *Canterbury*, &c. where the justices of *nisi prius* seldom come^z; nor into the city of *Worcester* or *Gloucester*, out of the county at large, because the assizes for the city and county at large are holden at the same place.

Where the cause of action arises in *Wales*, and the venue is laid elsewhere, it cannot be changed, without consent, into the next adjoining English county^a; because the defendant cannot make the common affidavit, which is never dispensed with, that the cause of action arose in that particular county, and not elsewhere^b. And it has been doubted, whether the venue can be changed, otherwise

^x Say. Rep. 77. Cowp. 176.

^z R. M. 1654. § 5. Barnes, 490.

^y 2 Str. 1180, 1216. 1 Willf. 138. and see 3 Blac. Com. 294.

^a 2 Str. 1258. 1 Willf. 138. S. C.

^b 4 Bur. 2452.

than

than by consent, directly into *Wales*^c; inasmuch as no trial can be had there, but the issues (if any) must be tried in the next adjoining English county: and if the defendant let judgment go by default, it is doubtful whether the court can award a writ of inquiry. The venue however has been frequently changed into the counties *Palatine*; because the court can send down the record there by *mittimus*^d. And, in one instance, it was changed into the next adjoining county^e.

The motion for the defendant to change the venue is a motion of course; and must formerly have been made, within eight days after the declaration delivered^f, which was the time allowed, by the rules of the court, for pleading^g. And accordingly it is said^h, that if a declaration be delivered so early in term, that the defendant has eight days in that term, he cannot move to change the venue the next

^c 2 Str. 1270. 1 Will. 807. Pr. Reg. 478, 9. 222. Say. Rep. 48. 4 Bur. Barnes, 478, 481, 488. 2450. 2 Blac. Rep. 562. *contra*.

Doug. 262, 3. and see the ^e 12 Mod 313.

stat. 13 Geo. 3. c. 51. § ^f 2 Salk. 688.

1, 2. ^g Id. 2 Str. 1192.

^d 2 Ld. Raym. 1418. ^h 1 Str. 211.

1 Will. 222. but see 2 Str.

term. But it is now settled, that the defendant may move to change the venue, at any time before plea pleadedⁱ: and he is even allowed to change it, after an order for time to plead, though upon the terms of pleading issuably; but not after an order for time to plead, where the terms are to plead issuably, and take short notice of trial, at the first or other sittings within term, in *London* or *Middlesex*; because a trial would by that means be lost^k. And the venue cannot be changed, in any case, after plea pleaded; even though the defendant afterwards have leave to withdraw his plea, and plead it *de novo* with a notice of set off^l.

In order to change the venue, the defendant must make a positive affidavit, *that the plaintiff's cause of action (if any) arose in the county of A. and not in the county of B. (where the venue is laid,) or elsewhere out of the county of A^m*. An affidavit was necessary, because the motion succeeded, and was equivalent to a plea in abatementⁿ; and the form of the affidavit, which was settled so

ⁱ R. M. 1654. § 5. Gilb. K. B. 339.

^j Say. Rep. 207.

^k Cowp. 511. Barnes, 493. S. P. but see 1 Wils. 245.

contra.

^l Palmer and Turner, H. 26 Geo. 3.

^m Sty. P. R. 631. R. M.

ⁿ 10 Geo. II. reg. 2. (c.)

^o 2 Blac. Rep. 1033.

long ago as the reign of King *Charles* the Second^o, has been ever most religiously adhered to^p.

Yet as it would be hard to conclude the plaintiff, by the single affidavit of the defendant, he is at liberty to aver, that the cause of action arose in the county where the venue is laid, and to go to trial thereon, at the same time that the merits are tried; by undertaking to give material evidence, arising in that county^q. And upon such undertaking, the court will discharge the rule for changing the venue^r. This practice is equivalent to joining issue, (as in *Fitzherbert* before cited) that the cause of action arose in the first county: and if the plaintiff fail in proving it, he must be non-suited at the trial; which has in this case the same effect, as quashing the writ by a judgment on a plea in abatement, viz. *quod eat sine die*, and the plaintiff must begin again^s. Originally it was required, that the plaintiff should give *no* evidence at the trial, but what arose in the county wherein the venue was retained^t: And if he gave no such evidence, he must have been non-suited of

^o 1 Sid. 185, 442.

^r 2 Salk. 669.

^p Say. Rep. 77. 4 Bur.

^s Gilb. C. P. c. 7.

2452.

^t 1 Keb. 859. 1 Sid. 442.

^q 2 Blac. Rep. 1033.

course.

course. But when it was laid down (more liberally) in *Swaine's case* ^v, that the plaintiff might lay his venue in any county, wherein part of the cause of action arose, he was then bound only to give *some* evidence, and not the whole, (*dare aliquam evidentiam*) in the county where the venue was laid ^v; which continues to be the rule at this day. The evidence however must be material; and therefore it is not sufficient merely to prove, that the witnesses to the contract reside in the county where the venue is laid ^w. But where a rule to change the venue from *Middlesex* to *London* was discharged, on the plaintiff's undertaking to give material evidence in *Middlesex*, the court held, that the undertaking was complied with, by proving a rule of court, obtained by the defendant in *Middlesex*, for paying money into court ^x; although that rule was obtained, after the rule for changing the venue was discharged.

It was formerly holden, that the plaintiff must move to discharge the rule for changing the venue, before replication ^y: and therefore, that he came too late after issue was

^v 1 Sid. 405.

^w 2 Blac. Rep. 1031.

^v 2 Salk. 662. 12 Mod.

^x 2 T. R. 275.

515.

^y 2 Str. 858.

joined,

joined, and delivered to the defendant's agent ^z. But now, as the plaintiff may alter his venue, by moving to amend ^a, so, for avoiding circuitry, he may move to discharge the rule for changing the venue, on undertaking to give material evidence in the county where it is laid, at any time before the cause is tried: And it was accordingly discharged in one case, after the cause had been twice taken down for trial ^b.

If two actions are brought by the same plaintiff, at the same time, for causes which may be joined, and particularly if the defendant is holden to bail in both, the court will compel the plaintiff to consolidate the actions; and, on account of the vexation, to pay the costs of the application ^c. But where three actions were successively brought by the same plaintiff against the same defendant, upon three notes of hand, which became due at different times, the court refused to consolidate them ^d. And the court will not con-

^z — v. *Boddington* and others, M. 20 Geo. 3. K. B. ² Str. 1149, 1178. *semb.* *contra.*

^a *Ante* 356.

^d *Mussenden* and O'Hara,

^b Cowp. 409.

M. 25 Geo. 3.

^c ² T. R. 639. but see

solidate actions against different defendants : Thus, where it was moved that four several declarations in trespass, against four different defendants, might be put into one, on an affidavit that the trespass, if any, was committed by all jointly ; the court said, they never went so far as the case of different defendants, but only where the declarations are between the same parties : The plaintiff may have the benefit of the others evidence, in his action against either ; but this would be to deprive him of that benefit ^e.

In actions upon a policy of assurance, against several under-writers, the court, by consent of the plaintiff, will make a rule, on the application of the defendants, which is called the *Consolidation* rule, for staying the proceedings in all the actions except one, upon the defendant's undertaking, to be bound by the verdict in that action, and to pay the amount of their several subscriptions and costs, in case a verdict shall be given therein for the plaintiff. This rule, though attempted before without success ^f, was introduced by Lord *Mansfield* into general use, to avoid the expence and delay arising from the trial of a

^e 1 Str. 420. and see Cas. temp. Hardw. 137.

^f 2 Barnardist. K. B. 103.

multiplicity

multiplicity of actions upon the same question^g; and if the plaintiff will not give his consent, the court have the power of granting imparlances in all the actions but one, till the plaintiff has an opportunity of proceeding to trial in that action^h. On the other hand, if the plaintiff consent to the rule, the court will make the defendants submit to reasonable terms, such as admitting the policy, producing and giving copies of books and papers, and undertaking not to file a bill in equity, or bring a writ of errorⁱ. But though the defendants undertake to be bound by a verdict in one action, yet this must be understood to mean such a verdict as the court thinks ought to stand, as a final determination of the matter; and therefore where the defendant, after a verdict for the plaintiff in one action, obtained a new trial, the court would not make a rule, previous to the new trial, for the other defendants to pay the money to the plaintiff, pursuant to their undertaking^k. In actions upon a policy of assurance, against several under-writers, where the parties had not entered into the consolidation

^g Parke's Insur. *Introd.*

ⁱ *Id. ibid.*

^h *Id. ibid.*

^k 3 Bur. 1477.

370 Of striking out Counts.

rule, the attorney for the plaintiff made out a full brief in one cause, but only a short statement in the rest; and the master, on taxation, having allowed for full briefs in all the causes, the court made a rule for him to review his taxation¹.

As the court, for the sake of avoiding expence, will consolidate unnecessary actions, so when it appears, on the face of the declaration, or by reference to the bill of particulars, that some of the counts are superfluous, the court will order them to be expunged; and if there be any vexation, will make the plaintiff pay the costs of the application. Thus, where several counts in a declaration are precisely the same, or, which more frequently happens, there is only a formal difference between them, and the same evidence will support each^m, as if the plaintiff declare specially and generally, for a matter that may be given in evidence upon a general count, the court will expunge the superfluous counts; and they will also expunge such counts as appear, by reference to the bill of particulars, to

¹ *Martineau v. Barnes and others*, H. 23 Geo. 3. ^m *Caf. temp. Hardw.* 129.

be altogether unnecessary, and inapplicable to the plaintiff's case. But where there is a material difference between the counts, and they are supported by the bill of particulars, the court will not determine, upon affidavits, whether they are well founded in point of fact; for if not, the plaintiff will be sufficiently punished by paying the costs, which he will be subject to, on such of the counts as are found for the defendant. If a declaration be unnecessarily long, the court will order the superfluous matter to be expunged; as where, in an action of covenant upon an indenture, the plaintiff recites the whole of it, and not merely such parts as are necessary^a; or where, in an action of trover, he sets out a long inventory of goods, with frequent and unnecessary repetitions and descriptions. In these cases, when the objection is clear, the court will order the superfluous counts or matter to be expunged, on motion, in the first instance; but otherwise they will refer it to the master, and decide upon his report.

^a Cowp. 665, 727.

C H A P. XXVII.

Of Pleas in Bar.

PLEAS in bar are calculated to shew, either that the plaintiff never had any cause of action, or if he had, that it is discharged, by some subsequent matter.

In actions upon *contracts*, the grounds of defence are, that there was no contract between the parties, in point of fact; or if there was, that it was void or voidable, in point of law; or, if there was a good and valid contract, that it has been performed; or, if not, that there is some legal excuse for the non-performance of it. Upon these grounds, it will appear, that the plaintiff never had any cause of action: or, admitting that he had, it may be discharged, by some subsequent matter, as by accord and satisfaction; arbitrament, release, &c. In actions for *wrongs*, the defendant may shew, that the plaintiff never had any cause of action, by denying the charge, or by justifying or excusing it; or he may discharge the action, by means similar to those in actions upon contracts.

Considered

Considered with reference to the declaration, pleas are in denial, or confession and avoidance, of the cause of action; or they conclude the plaintiff by matter of estoppel^a. Pleas in denial are of the whole, or a part of the declaration; and in avoidance, they are by matter precedent, which shews the plaintiff never had a cause of action, and is called an avoidance in law, or by matter subsequent, which discharges the cause of action, and is called an avoidance in fact^b.

When the defendant means to deny the whole charge contained in the declaration, or that which constitutes the gist or foundation of the action, he should plead the general issue: as in *assumpsit*, *non assumpsit*; in *debt* on simple contract, *nil debet*; in *debt* on specialty, *non est factum*; in *debt* on record, *nul tiel record*; in *detinue*, *non detinet*; and in *trespass vi et armis*, and *trespass* on the *case*, not guilty.

In *assumpsit*, the general issue is proper, where there was either no contract between the parties, or not such a contract as the plaintiff has declared on. And the defendant may give in evidence under it, that the

^a 5 Hen. 7. 14. 1 Leon. ^b 5 Hen. 7. 14.
77. Sav. 86.

contract was *void* in law by coverture^c, gaming^d, usury^e, &c., or *voidable* by infancy^f, duress, &c.; or if good in point of law, that it was *performed*, by payment^g, or otherwise; or if unperformed, that there was some legal *excuse* for the non-performance of it, as a release or discharge before breach, or non-performance by the plaintiff of an executory consideration, &c. This sort of evidence will shew that the plaintiff had no cause of action. But if he had, the defendant may give in evidence, under the general issue, that it was *discharged* by an accord and satisfaction^h, arbitrament, account stated, releaseⁱ, foreign attachment^j, or former recovery for the same cause^k, &c. In short, the question in *assumpsit*, upon the general issue, is whether there was a subsisting debt, or cause of action, at the time of commencing the suit^l.

^c 12 Mod. 101.

Salk. 394.

^d 1 Ld. Raym. 87. 1
Salk. 344. Carth. 356. 5
Mod. 170. 12 Mod. 97. S.
C.

^h 1 Ld. Raym. 566. 12
Mod. 376. S. C.

ⁱ Gilb. C. P. 64. Doug.
106, 7.

^e 1 Str. 498.^j 1 Salk. 280.^f 1 Salk. 279.^k 2 Str. 733.^g 1 Ld. Raym. 217, 566.^l Doug. 106, 7.

12 Mod. 376. S. C. 1

But

But matters of law ^m, in avoidance of the contract, or discharge of the action, are usually pleaded. And it is necessary to plead a tender, set-off, or the statute of limitations ⁿ, &c.

In *covenant*, there is, properly speaking, no general issue; for though the defendant may plead *non est factum*, as in debt on specialty, yet that only puts the deed in issue, and not the breach of covenant: and *non infregit conventionem*, to a negative covenant, has been holden to be a bad plea^o. In this action therefore the defendant must specially controvert the deed, or shew that he has *performed* the covenant, or is legally *excused* from the performance of it; or admitting the breach, that he is *discharged* by matter *ex post facto*, as a release, &c.

^m Hob. 127. 2 Vent. 295. Formerly, matters in discharge of the action must have been pleaded specially. 1 Ld. Raym. 566. 12 Mod. 376. S. C. Afterwards, a distinction was made between express and implied *assumpsits*: In the former, these matters were still required to be pleaded, but

not in the latter. Vin. Abr. tit. *Evidence*, Z. a. 1 Saik. 280. Gilb. C. P. 65. At length, about the time of Ld. Holt, they were universally allowed to be given in evidence under the general issue. 1 Ld. Raym. 217, 566. 12 Mod. 376. S. C.

ⁿ 1 Ld. Raym. 153.

^o 1 Lev. 183. 3 Lev. 19.

In *debt* on simple contract, *nil debet* is a good plea, or, in actions by and against executors and administrators, *non detinet*, in all cases where nothing was due to the plaintiff, at the time of commencing the action^p: and under this plea, the defendant may not only put the plaintiff upon shewing the existence of a legal contract, but he may give in evidence the *performance* of it, or offer an *excuse* for its non-performance. He may also give in evidence, under this plea, a release, or other matter in discharge of the action^q. And it has even been holden, that, as the plea is in the present tense, the statute of limitations may be given in evidence under it^r. But in debt for rent, on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence, that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him^s. And in debt *qui tam*, the defendant was not allowed to give in evidence, on *nil debet*, a former recovery against him, by ano-

^p Com. Dig. tit. *Pleader*, *Debt*, 434, 443. *semb. contra.*
(2 W. 16.)

^q 1 Ld. Raym. 566. 12 Mod. 376. S. C. 1 Ld. Raym. 394. S. P. Gilb.
^r 1 Ld. Raym. 153.
^s 1 Salk. 278.

ther person, for the same cause ^t. In this action also, as in *assumpsit*, a tender and set-off must be specially pleaded.

Where a specialty is but inducement to the action, and matter of fact the foundation of it, there *nil debet* is a good plea; as in debt for rent by indenture, for the plaintiff need not set out the indenture: so in debt for an escape ^u, or on a *devastavit* against an executor ^v, the judgment is but inducement, and the escape and *devastavit* are the foundation of the action. But where the deed is the foundation, and the fact but inducement, there *nil debet* is no plea; as in debt for a penalty, on articles of agreement ^w, or on a bail bond ^x.

It sometimes happens, that, instead of pleading the general issue of *nil debet* to the whole declaration, the defendant, for greater certainty, will select and deny some particular fact, necessary to maintain the action; as the demise in debt for rent, on a parol lease, to

^t 1 Str. 701, 2.

² Str. 778. 1 Barnardist.

^u 2 Salk 565.

K. B. 15. 8 Mod. 106,

^w 1 Saund. 219. Cart. 2. 323, 382. S. C.

^v 2 Ld. Raym. 1500.

^x *Id.* Fort. 363, 367.

which

which he may plead *non demisit*^y: but he cannot plead this plea, in debt for rent on an indenture^z; and it is said, that *riens in arrear* is not a good plea, without concluding *et issint nil debet*^a.

In *debt* on bond, or other specialty, the general issue of *non est factum* is good, in all cases where the deed was not executed, or varies from the declaration^b. And the defendant may give in evidence under it, that the deed was void *ab initio*^c, being obtained by fraud, or made by a married woman, lunatic^d, &c. or that it became void after it was made, and before the commencement of the action^e, by erasure, alteration, cancelling, &c.; or that it was delivered as an escrow^f, to a third person. But he cannot give in evidence, under the general issue, that the deed was *voidable*^g, by infancy, duress, *per minas*^h,

^y Gilb. *Debt*, 438.

^e 5 Co. 119. b. Sav. 71.

^z *Id.* 436.

semb. contra.

^a *Id.* 440. cites Bro. *Dette*,
113. Keilw. 153.

^f 2 Rol. Abr. 683. l. 5.

T. Raym. 197. Mod. Caf.

^b Com. Dig. tit. *Pleader*,

217.

(2W. 18.)

^g 5 Co. 119. a. Gilb.

^c 5 Co. 119. and see 2

Debt, 437. 2 Salk. 675.

Willf. 341, 347.

1 Ld. Raym. 315. S. C.

^d 2 Str. 1104.

^h 2 Inst. 482, 3.

&c.

&c. or that it was *void* by act of parliamentⁱ, as by the 23 *Hen. 6. c. 9.* relating to sheriffs' bonds, or by the statutes of usury^k, or gaming, &c. In these cases therefore, the defendant must plead specially: So he must plead *payment*, at or after the day, *performance*, or any matter in *excuse* of performance, as *non damnificatus* to a bond of indemnity, *no award* to an arbitration bond, or, to a bail bond, no process to arrest the defendant^l, &c. He must also plead specially, in *discharge* of the action, a tender, set-off, satisfaction, former recovery, or release, &c.

In *debt* on record, the general issue of *null tiel record* is proper, where there is either no record at all, or one different from that which the plaintiff has declared on^m. But as this plea only goes to the existence of the record, the defendant must plead payment, or any matter in discharge of the action.

In *detinue*, the defendant may give in evidence, under the general issue of *non detinet*, a gift from the plaintiff; for that proves he detaineth not the plaintiff's goodsⁿ. But he

ⁱ 5 Co. 119. a.

^k 1 Str. 498.

^l Say. Rep. 116.

^m Gilb. *Debt*, 444. 3
Mod. 41.

ⁿ Co. Lit. 283.

cannot

cannot give in evidence, that the goods were pawned to him for money, which is not paid; but he must plead it.

In trespass to *persons*, the general issue of not guilty may be properly pleaded, if the defendant committed no assault, battery, or imprisonment, &c.; in trespass to *personal* property, if the plaintiff had no property in the goods; and in trespass to *real* property, if he was not in possession of the land, &c. And *liberum tenementum* may be given in evidence, under the general issue°. But regularly, by the common law, matter of excuse or justification must be *specially* pleaded^p; as in trespass to persons, *son assault demesne*: or in trespass to real property, a licence^q, that the beasts came through the plaintiff's hedge, which he ought to have repaired; or by reason of a rent-charge, common, or the like^r. And the defendant must plead specially a release, or other matter in *discharge* of the action°. But in actions against justices, &c. and in various other cases, the defendant, by act of parliament, is allowed to plead the ge-

° Andr. 108.

21 Hen. 7. 28. a. *per*

^p Co. Lit. 282, 3. 2 Rol. *Rede, contra.*

Abr. 682. 12 Mod. 120.

^q Co. Lit. 283.

^r Hob. 174, 5. but see

[°] 3 Bur. 1355.

neral issue, and give the special matter in evidence^t.

In actions upon the *case*, the defendant, upon the general issue of not guilty, may not only put the plaintiff upon proof of the whole charge contained in the declaration, but may offer any matter in excuse or justification of it^u; or he may set up a former recovery, release, or satisfaction^v. For an action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and in effect is so; and therefore such a former recovery, release or satisfaction need not be pleaded, but may be given in evidence: since whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may, in this action, be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case, and upon that only. In *trover*, it is commonly said, there is no special plea except a release; but this is a mistake, for the defendant may plead specially any thing else, which, admitting the plaintiff

^t Co. Lit. 283.

Will. 44. 175.

^u 2 Mod. 276, 7. 3 Mod. v 3 Bur. 1353. 1 Blac.
166. Com. Rep. 273. 1 Rep. 388. S. C.

had

had once a cause of action, goes to discharge it, as the statute of limitations^w, or a former recovery^x, &c. In an action for *words*, the truth of the words cannot be given in evidence, under the general issue of not guilty^y. And by the 8 & 9 W. 3. c. 27. § 6. "no retaking on fresh pursuit shall be given in evidence, on the trial of any issue, in any action of *escape*, against the marshal, &c. unless the same shall be specially pleaded; nor shall any special plea be received or allowed, unless oath be first made in writing by the defendant, and filed in the proper office, that the prisoner, for whose escape such action is brought, did escape without his consent, privity, or knowledge."

Where the general issue may, it ought in general to be pleaded; it being a good cause of demurrer, that the plea amounts to the general issue. But it is observable, that in many cases, where the defence consists of matter of law, the defendant may either plead it specially, or give it in evidence under the general issue; as in *assumpsit*, infancy, accord and satisfaction, or a release, &c. may be either pleaded, or given in evidence upon

^w 1 Lutw. 99.

^y 2 Str. 1200.

^x 1 Show. 146.

non assumpsit; and in *debt* on bond, the defendant may either plead coverture, or give it in evidence upon *non est factum*. In these cases, from the nature of the defence, the plaintiff has an *implied* colour of action, bad indeed in point of law, if the facts pleaded be true, but which is properly referred to the decision of the court. And where, from the nature of the defence, the plaintiff would have no *implied* colour of action, the defendant, in some cases, is allowed to give him an *express* colour². Thus, in the common, and almost only, case where express colour is now given, if in an action of trespass *quare clausum fregit*, the defendant plead a possessory title, under a demise from a third person, (for if he claim under the plaintiff, there is an implied colour), this, without more, would amount to the general issue; for it goes to deny that the trespass was committed in the plaintiff's close: but if the defendant, after stating his own title, supposes (as is usual) that the plaintiff entered upon him, under colour of a former deed of feoffment, without livery, and that he re-entered, this creates a question of law, for the decision of the

² For the difference between express and implied colour, see an argument of Holt, in *Reg. Plac.* 303.

court; and by that means prevents the plea from amounting to the general issue: and being matter of supposal, it is not traversable.

In trespass for taking goods, if the defendant plead that *A.* was possessed of them, as of his proper goods, and sold them in market overt, or that *B.* stole the goods from *A.* and waived them within his manor, wherefore he took them, the defendant must give colour; for his plea proves that no property was in the plaintiff, so he had no colour of action: and the colour usually given in such cases is, that the defendant bailed the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them. But, in the same cases, if the defendant plead that *A.* sold the goods in market overt, without saying that they were his own, or that *B.* took them *de quodam ignoto*, and waived them, the plea is good without colour; for it does not deny but that the property was in the plaintiff, and the defendant is not bound to shew expressly in whom it was^a.

^a Dr. *Leyfield's* case, 10 *per totum*. Dr. & Stud. l. 2. Co. 90. b. And for more c. 53. 3 Salk. 273. 3 Blac. of the doctrine concerning Com. 309. Colour, see the same case

Pleas are single or double. At common law, the defendant could only have pleaded a single matter to the whole declaration; which rigour often abridged the justice of his defence, and was doubtless one cause of perplexed in-artificial pleading; the party endeavouring to crowd as much reason as he could into his plea, however intricate, repugnant and contradictory, he made it by so doing^b. But even at common law, the defendant might have pleaded several matters, to different parts of the declaration; as not guilty to part, and to other part a justification, or release, &c. And where there were several defendants, each of them might have pleaded a single matter to the whole, or several matters to different parts of the declaration^c. And now, by the statute for the amendment of the law^d,
 “the defendant or tenant in any action or suit,
 “or any plaintiff in replevin, in any court of
 “record, may, with the leave of the same
 “court, plead as many several matters there-
 “to, as he shall think necessary for his de-
 “fence: Provided nevertheless, that if any

^b 2 *Eunom.* 141.^d 4 & 5 Ann. c. 16. § 4.^c Co. Lit. 303. a.

5.

“ such matter shall, upon a demurrer joined,
 “ be judged insufficient, costs shall be given
 “ at the discretion of the court ; or if a ver-
 “ dict shall be found, upon any issue in the
 “ said cause, for the plaintiff or demandant,
 “ costs shall be also given, in like manner ;
 “ unless the judge, who tried the said issue,
 “ shall certify, that the said defendant or
 “ tenant, or plaintiff in replevin, had a pro-
 “ bable cause to plead such matter, which
 “ upon the said issue shall be found against
 “ him. Provided also, that nothing in this
 “ act shall extend to any writ, declaration, or
 “ suit of appeal of felony, &c. or to any writ,
 “ bill, action, or information upon any penal
 “ statute.”

Upon this statute, it has been hold-
 en, first, that the defendant shall not be
 allowed to plead *non assumpsit*¹, or *non est fac-
 tum*², to the whole declaration, and a *tender*
 as to part ; for one of these pleas goes to de-
 ny that the plaintiff ever had any cause of ac-
 tion, and the other partially admits it : se-
 condly, that he shall not plead several matters,
 which require different trials, as, in dower,
ne unques accouple en loyal-matrimonie, and a

¹ Same statute, § 7.

² 5 T. R. 97.

³ 4 T. R. 194.

mortgage, or *ne unques seisie que dower*^h; for the first matter is triable by the bishop, and the others by a jury, and, if the former be found against the defendant, the judge cannot certify, that he had a probable cause of pleading it: thirdly, that the statute does not extend to any action, or information, upon a penal statuteⁱ. But subject to these exceptions, the defendant may plead as many different matters, as he shall think necessary for his defence, though they may appear to be contradictory or inconsistent; as *non assumpsit* and the statute of limitations, or, in trespass, not guilty, a justification, and accord and satisfaction, &c. So he may plead *non assumpsit* and infancy, or not guilty and *liberum tenementum*; though, as infancy may be given in evidence upon *non assumpsit*, and *liberum tenementum* upon not guilty, the pleading of these matters specially, seems to be useless and unnecessary. In order to plead two or more matters, it is not necessary that an affidavit should be made of the facts; but the court formerly expected to be informed, what the

^h Com. Rep. 148. 2 Blac. 262. 2 Str. 1044. S. C. 4 Rep. 1157, 1207. but see T. R. 701. K. B. Pr. Reg. 2 Will. 118. *semb. contra.* 318. Barnes, 15, 353, 365. ⁱ § 7. ante 386. 1 Barnardist. 2 Will. 21. C. P. K. B. 17. Cas. temp. Hardw.

matters were, that were desired to be pleaded, in order to judge whether they were proper^{*}; though now, the motion for leave to plead several matters is become a mere motion of course, which only requires a counsel's signature: and the motion paper being delivered to the clerk of the rules, he will draw up a rule thereon, a copy of which should be delivered with the plea, if it be then ready; or otherwise the plaintiff's attorney should have notice, that instructions have been given for the rule, and that a copy will be delivered as soon as it is drawn up. If a double plea be filed, without a rule to plead several matters being drawn up, or instructions given for it to the clerk of the rules, it is a mere nullity; and the plaintiff may sign judgment[†]: But if a rule be obtained, and the plea put in, without saying by leave of the court, it is only an irregularity, or at most cause of special demurrer for duplicity[‡].

Respecting costs, upon this statute, the intention of the legislature appears to have been, that if there be several matters pleaded, some of which are found for the

^{*} R. T. 5 & 6 Geo. II. (b.) *ford* and *Gafield*, H. 26

[†] *Per Buller*, Just. in *Bed.* Geo. 3. K. B.

[‡] 1 Will. 219.

plaintiff,

plaintiff, he shall be entitled to the costs of thoseⁿ, notwithstanding other matters are found for the defendant, which entitle him to judgment upon the whole record; unless the judge, before whom the cause was tried, shall certify, that the defendant had a probable cause to plead the matters which are found against him. That this is the true construction of the statute, will appear from the following cases.

In trespass, the defendant pleaded not guilty and several justifications; upon the trial, the plaintiff not proving his possession of the *locus in quo*, the defendant had a verdict; and, by direction of *Denison J.* the verdict was entered upon the general issue only; upon which there was a motion for a *venire de novo*: but the court refused the motion, saying, the verdict was complete, and determined the cause; that the plaintiff was not entitled to damages, though, they said, he might have insisted to have a verdict entered on the

ⁿ In *Sayer's Law of Costs*, p. 223. it is said, he shall have the costs not only of those matters, but also of the others, notwithstanding they are found for the defendant. But this seems to be a mistake; for the defendant, being entitled to judgment upon the matters found for him, is consequently entitled to the costs of them.

other issues, for the sake of costs, which he would be entitled to, unless the judge certified, that the defendant had probable cause to plead such plea^o. But where the defendant, in trespass, pleaded three different justifications, to three different counts, and, on issue joined, had a verdict for him on two, and against him on the third; on motion, this was holden not to be a case within the act, and that the plaintiff was entitled to costs at common law, on the whole declaration^p.

Where the defendant pleads not guilty, and a justification to which the plaintiff demurs, and the plaintiff has judgment on the demurrer, but is nonsuited on the plea of not guilty, he shall nevertheless be allowed the costs of the demurrer, which shall be deducted out of the costs allowed to the defendant^q. And if one of several pleas, pleaded by defendant, be adjudged bad, on a demurrer to plaintiff's replication, the plaintiff is entitled to have the costs of those pleadings deducted, from the costs taxed for the defendant upon the *posse*, if afterwards, upon the trial of the issues joined on the other pleas, the defendant should have a verdict; even though it

^o *Bul. Ni. Pri.* 335.

was in the Common Pleas.

^p *Id. ibid.* but note, this

^q Barnes, 136.

should

should appear, on the whole of the record, that the plaintiff had no cause of action^r. But if the plaintiff take issue on several pleas, one of which is insufficient in law, and has a verdict on all the issues, except that joined on the insufficient plea, which is found for the defendant, and afterwards judgment is entered for the plaintiff, still he shall not be allowed any costs, upon the issue found for the defendant^s. And it has been resolved, at a meeting of all the judges, that if there be a certificate upon the 43 *Eliz.* the plaintiff shall not have the costs of any plea, pleaded with leave of the court; although the issue thereupon joined be found for him, and the judge have not certified, that the defendant had a probable cause for pleading the matter therein pleaded^t.

In an action for criminal conversation, the defendant pleaded two pleas, *viz.* not guilty, and not guilty within *six* years; on the former, the plaintiff joined issue, and obtained a verdict, but to the latter there was a demurrer, and judgment against him; and it was holden, that the defendant should have the

^r 2 T. R. 391.

Barnes, 133.

^s 1 T. R. 266. but see

^t Say. Rep. 260.

costs of the demurrer, but, upon the trial, there should be no costs on either side ^u.

The *avowant* or defendant in replevin, though not within the words, is plainly within the meaning, of the statute 4 Ann. c. 16. And accordingly, where some issues in replevin are found for the plaintiff, which entitle him to judgment, and some for the defendant, the latter must be allowed the costs of the issues found for him, out of the general costs of the verdict; unless the judge certify, that the plaintiff had a probable cause for pleading the matters, on which those issues are joined ^v: and the general rule is said to be this, where several matters are pleaded by the plaintiff, some of which are found for him, and others for the defendant, so that the plaintiff is entitled to judgment; if the judge who tried the cause certify, that there was a probable cause for pleading those pleas, the master is not to deduct the costs of the issues so found for the defendant; but if there be no certificate, the

^u 2 Bur. 753. 2 Will. 85. court of Common Pleas, Say. Costs, 221. S. C. The (Barnes, 141.) as well as authority of this case seems from the reasoning that prevailed in several of the foregoing cases.
^v 2 T. R. 235.

defendant

defendant is intitled to have those costs deducted for him ^w.

The certificate of probable cause is not required to be made in court, at the trial of the cause ^x; and, where the judge refuses to grant it, the court have not a discretionary power, whether they will allow the defendant any costs at all; but are bound by the statute to allow him some costs, though the *quantum* is left to their discretion ^y.

The general qualities and conditions of a plea are, first, that it be conformable to the count ^z; and, taken collectively, answer the whole declaration: for if any part of the declaration be left unanswered, it operates as a discontinuance. If a plea begin with an answer to the whole, but in truth the matter pleaded is only an answer to part, the whole plea is naught, and the plaintiff may demur; but if a plea begin only as an answer to part, and is in truth but an answer to part, it is a discontinuance, and the plaintiff must not de-

^w 2 T. R. 237. and see Barnes, 141, 144, 146. ^x Barnes, 141.
^y *Id.* 140. 2 T. R. 394, Doug. 708, 9. in *notis*, accord. 5.
^z Co. Lit. 303. a.

mur, but take his judgment for that as by *nil dicit*; for if he demurs, or pleads over, the whole action is discontinued^a. Secondly, the plea should be *single*, consisting only of one fact, or of several facts making together one point: for if a plea contain duplicity, or alledge several distinct matters, which require several answers, to the same thing, it is bad^b. Thirdly, it should be *certain*^c, in point of form, as well as substance: but certainty to a common intent is sufficient^d; and that which is apparent to the court, by necessary collection out of the record, or is necessarily implied, need not be expressed^e, as in setting forth the feoffment of a manor, it is unnecessary to state livery and attornment: So, that which is alledged by way of conveyance, or inducement to the substance of the matter, need not be so certainly alledged, as that which is the substance itself^f. Fourthly, as a mode of certainty, every plea must be *direct and positive*, and not by way of argument or rehearsal^g. Fifthly, it should be so pleaded, as to be *capable of trial*, by the court upon

^a 1 Salk. 179, 80. Gilb.

^e *Id. ibid.*

C. P. 155, 157.

^f *Id.* 303. a.

^b Co. Lit. 304. a.

^g *Id. ibid.* & 304. a.

^c *Id.* 303. a.

Hob. 295.

^d *Id.* 303. b.

demurrer

demurrer or *nul tiel record*, or by the jury upon an issue in fact^b. Sixthly, it should be *true*, and capable of proof; for truth is said to be the goodness and virtue of pleading, as certainty is the grace and beauty of it^c. Seventhly, the plea shall be taken most strongly against him that pleadeth it, for every man is presumed to make the best of his own case^k. But, lastly, *surplusage* shall never make the plea vicious, except where it is repugnant, or contrary to matter precedent^l.

In many cases, the law doth allow *general* pleading, for avoiding prolixity and tediousness; and the particulars shall come on the other side^m. Thus, when a man is bound to perform all the covenants in an indenture, if they are all in the affirmative, he may plead performance generally: but if any are in the negative, to so many he must plead specially, (for a negative cannot be performed), and generally to the rest. So if any are in the disjunctive, he must shew which of them he hath performedⁿ. And if any are

^b Co. Lit. 303. b. 9 Co. 24, 5. March, 207.

^c Hob 295.

^k Co. Lit. 303. b.

^l *Id. ibid.* For the several

cases that illustrate the above rules, see Com. Dig. tit.

Plader, (E.) &c.

^m Co. Lit. 303. b.

ⁿ *Id. ibid.*

to be done of record, he must shew those specially, and cannot involve them in general pleading. In setting forth a title, general estates in fee simple may be generally alledged; but the commencement of estates tail, and other particular estates, must regularly be shewn, unless in some cases, where they are alledged by way of inducement^o: and the life of tenant in tail, or for life, ought to be averred^p.

Every plea ought to have its proper conclusion^a: When the general issue is pleaded, or the defendant simply denies some material fact alledged in the declaration, he should conclude his plea, by putting himself upon the country; but where the plea advances new matter, in the *affirmative*, the defendant should conclude it with an averment, or verification and prayer of judgment *si actio*; or, in other words, by professing himself ready to verify the plea, and praying judgment, if the plaintiff ought to have or maintain his action against him. An *avowry* however, wherein the defendant is an actor, and which is in the nature of a count, need not be averred^r; nor pleas which are merely in the *negative*, be-

^o Co. Lit. 303. b.

^p *Id. ibid.*

^a *Id. ibid.*

^r *Id.* 303. a.

cause a negative cannot be proved. Where a judgment, or other matter of record, is pleaded, the plea should conclude with a verification *by the record*: And where the matter of the plea shews there never was a good cause of action, as in debt on bond against an heir, who pleads *riens per descent*, the defendant, instead of concluding that the plaintiff ought not to have his action, may conclude that he (the defendant) ought not to be charged with the debt, by virtue of the writing obligatory *. In an action of *debt*, the defendant, in pleading a tender, ought to conclude his plea, by praying judgment if the plaintiff ought to have or maintain his action, to recover *any* damages against him; for in this action, the debt is the principal, and the damages are only accessory: but in *assumpsit*, the damages are the principal; and therefore, in pleading a tender, the defendant ought to conclude his plea, with a prayer of judgment if the plaintiff ought to have or maintain his action, to recover any *more or greater* damages than the sum tendered, or *any* damages by reason of the non-payment thereof *. In

* 2 Saik. 516.

Raym. 254. S. C.

* 2 Saik. 622. 3. 1 Ld.

pleading

pleading matter of estoppel, the defendant in his conclusion ought to rely upon it ^v.

The general issue is engrossed on treble penny stamped paper, and delivered to the plaintiff's attorney, or entered in the general issue book, kept by the clerk of the judgments ^v; and it need not be signed by counsel. There are also certain *common* pleas, that need not be signed or filed, but may be delivered to the plaintiff's attorney; such as a special *non est factum*, *solvit ad diem* ^w, *compervit ad diem* to a bail bond, or *nul tiel record* to an action on a judgment or recognizance; in covenant, when the plea concludes to the country; and in trespass, *son assault demesne*, *liberum tenementum*, or not guilty to a new assignment. All pleas and demurrers upon writs of error, *scire facias*, and *audita querela*, ought also to be delivered ^x. But, except in the foregoing cases, all special pleas must be

^w Co. Lit. 303. b.

^v R. T. 5 & 6 Geo. II. (b)

^w *Lockhart* and others v. *Mackreth*, T. 34 Geo. III. In this case, it was determined, that the plea of *solvit ad*

diem should be delivered to the plaintiff's attorney, and not entered in the general issue book, or filed with the clerk of the papers.

^x R. T. 12 W. III. (a).

signed

signed by counsel^y, and filed in the office of the clerk of the papers^z, who makes copies of them, if required, for the plaintiff's attorney.

The defendant cannot commonly *waive* the general issue, or a general demurrer, and instead thereof give a special plea or demurrer^a; but it is said, that if the general issue be not entered, the defendant may waive it, and plead specially, without leave of the court, in four days^b; or, as it should seem, before the adjournment day of the term^c, or within the first five days of the ensuing term^d; and even afterwards, where it is not to the prejudice or delay of the plaintiff, the defendant, by leave of the court, may withdraw the general issue, in order to plead specially^e, or in order to plead it again, with a notice of set-off^f, or upon bringing money into court^g.

If a special plea, or special demurrer, be put in, and the book is made up, and delivered to

^y R. E. 18 Car. II.

^d *Prax. utr. banci*, 37. R.

^a R. T. 2 Jac. I. R. T. T. 5 & 6 Geo. II. (b).

16 Car. II. R. M. 2 W. & M. ^e 2 Str. 906, 1181. 1 Wilf. 177, 254. 1 Blac.

^a R. T. 5 & 6 Geo. II. Rep. 357. 2 Wilf. 204.

(b). 1 Wilf. 29. *in marg.* ^f 2 Str. 1267.

Rich. K. B. 255. ^g *Id.* 1271. 1 Wilf. 254.

^b 1 Ld. Raym. 674. S. C. cited.

^c Say. Rep. 87.

the defendant's attorney, he may, by the ancient practice of the court, strike out the special plea or demurrer, and return it with the general issue, or a general demurrer^h. To prevent this, if the defendant plead a dilatory or frivolous plea, the court in term time, or a judge in vacationⁱ, will order him to abide by it, or plead some other plea, peremptorily, on the morrow; or, if it be towards the end of the term, *instantly*, provided the time allowed by the rule to plead be expired, in order that the plaintiff may have sufficient time to give notice of trial^k. And the practice is the same, with regard to frivolous demurrers^l.

When the defendant is ruled to abide by his plea, he either abides by it, or pleads another: in the former case, he may afterwards demur to the plaintiff's replication^m; in the latter, he can only plead the general issueⁿ, to which however he may add a notice of set-off^o. And, whether he be ruled to abide by his plea or not, it is a general rule, that the defendant cannot waive a special plea, or special demurrer, but in order to plead the ge-

^h R. T. 5 & 6 Geo. II.

(b). 1 Will. 29.

ⁱ 2 Bur. 781.^k R. T. 5 & 6 Geo. II.

(b).

^l *Id. ibid.*^m 2 Str. 1185.ⁿ 1 T. R. 693.^o *Id.* 694. *in notis.*

neral issue^p; though leave has been given, under circumstances, for the defendant to add a plea, after issue joined, and even after two terms have elapsed, since he first pleaded^a.

^p 2 Str. 960. 1 Wils. 29. ^a 1 Wils. 223.

C H A P. XXVIII.

Of the Notice of Set-Off, and bringing Money into Court.

THE plea of the general issue is frequently accompanied with a notice of set off, or rule to bring money into court; which will therefore be treated of in the present chapter.

At common law, if the plaintiff was as much, or even more indebted to the defendant, than the defendant was to him, yet he had no method of striking a balance: the only way by obtaining relief, was by going into a court of equity^a. To remedy this inconvenience, it was enacted by the statute 2 Geo. II. c. 22. § 13. "that where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other; and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the

^a 2 Bur. 820.

" case

“ case shall require, so as at the time of his
 “ pleading the general issue, where any such
 “ debt of the plaintiff his testator or intestate
 “ is intended to be insisted on in evidence,
 “ notice shall be given of the particular sum
 “ or debt so intended to be insisted on, and
 “ upon what account it became due ; or other-
 “ wise such matter shall not be allowed in
 “ evidence, upon the general issue.” This
 clause was made perpetual, by the 8 Geo.
 II. c. 24. § 4. ; and it having been doubted,
 whether mutual debts of a *different* nature
 could be set against each other, it was by the
 last-mentioned statute, (§ 5.) further enacted
 and declared, “ that by virtue of the said
 “ clause, mutual debts may be set against
 “ each other, either by being pleaded in
 “ bar, or given in evidence on the general
 “ issue, in the manner therein mentioned,
 “ notwithstanding that such debts are deemed
 “ in law to be of a different nature ; unless
 “ in cases where either of the said debts shall
 “ accrue by reason of a penalty, contained in
 “ any bond or specialty ; and in all cases,
 “ where either the debt for which the action
 “ hath been or shall be brought, or the debt
 “ intended to be set against the same, hath
 “ accrued, or shall accrue, by reason of any

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“ such penalty, the debt intended to be set
 “ off shall be pleaded in bar ; in which plea
 “ shall be shewn, how much is truly and
 “ justly due on either side ; and in case the
 “ plaintiff shall recover in any such action or
 “ suit, judgment shall be entered for no more
 “ than shall appear to be truly and justly due
 “ to the plaintiff, after one debt being set
 “ against the other as aforesaid ^b.”

The actions in which a set off is allowable, upon these statutes, are *debt*, *covenant*, and *assumpsit*, for the non-payment of money ; and the demand intended to be set off must be such, as might have been made the subject of one or other of these actions. A set off therefore is never allowed in actions upon the *case*, *trespass*, or *replevin* ^c, &c. ; nor of a *penalty*, in debt on bond conditioned for the performance of covenants ^d, &c. nor of *general* damages in *covenant* ^e or *assumpsit* ^f : but

^b The day after the last act passed, Lord Hardwicke Ch. J. delivered the opinion of the court of King's Bench, that a debt by simple contract might, by the former act, have been set off against a specialty debt. *Brown & Holyoak*, 8 Geo. II. Bul. Ni. Pri. 179. ^c Barnes 450. Bul. Ni. Pri. 181. S. C. *Graham v. Fraine*, Hil. 24 Geo. II. and *Laycock v. Tuffnell*, E. 27 Geo. III. B. R. S. P. but see 4 T. R. 511. ^d Bul. Ni. Pri. 179. 2 Bur. 1024. ^e Cowp. 56. ^f 1 Blac. Rep. 394.

where

where a bond is conditioned for the payment of an annuity ^g, or of *liquidated* damages ^h, a set off may be allowed. A debt barred by the statute of limitations cannot be set off; and if it be pleaded in bar to the action, the plaintiff may reply the statute of limitations, or if given in evidence, on a notice of set off, it may be objected to at the trial ⁱ.

The debts sued for, and intended to be set off, must be *mutual*, and due in the same right: therefore a joint debt cannot be set off against a separate demand, nor a separate debt against a joint one; but a debt due to a defendant, as surviving partner, may be set off against a demand on him in his own right ^k. In an action of debt against a man on his own bond, he cannot set off a debt due to him in right of his wife ^l. Neither, for the same reason, can a defendant, sued as executor or administrator, set off a debt due to himself personally; nor, if sued for his own debt, can he set off what is due to him as executor or administrator. But where an action is brought by or against a *trustee*, a set off may be made, of money due to or from the *cestui*

^g 2 Bur. 820.

^k 5 T. R. 493.

^h 2 T. R. 32.

^l Bul. Ni. Pri. 179.

ⁱ Bul. Ni. Pri. 180.

que trust^m. It was formerly holden, that the statutes of set off did not extend to assignees of a bankruptⁿ; but it has since been determined, that in an action at their suit, the defendant may set off a debt due to him, at the time of the bankruptcy^o; but a note indorsed to him afterwards, cannot be set off^p.

Where either of the debts accrues by reason of a penalty, the debt intended to be set off must be pleaded in bar; and the defendant, in his plea, must aver what is really due^q, which averment has been held to be traversable^r: But in all other cases, the defendant may either plead or give notice of set off, at his election^s. If, at the time of the action brought, a larger sum was due from the plaintiff to the defendant, than from him to the plaintiff, the action being barred, it seems more proper to plead the set off; and it is usually pleaded in country causes, to save the trouble and expence of proving the service of a notice. But where the sum intended to be

^m 1 T. R. 622.

§ 5.

ⁿ 1 Will. 155.

^r 3 T. R. 65.

^o Cowp. 133.

^s 2 Bur. 1231. Bul. Nt.

^p 2 Str. 1234.

Pri. 179.

^q Stat. 8 Geo. II. c. 24.

set off is less than that for which the action is brought, a notice of set off should be given^{*}.

The notice of set off should regularly be given with, or at the time of pleading the general issue. Though if it be not then given, the court, we may remember, will give the defendant leave to withdraw the general issue, and plead it again, with a notice of set off^u; and such notice may be given with the general issue, after the defendant has been ruled to abide by his plea^v. In point of form, a notice of set off should be almost as certain as a declaration: therefore where the notice of set off was in these words, "Take notice that you are indebted to me for the use and occupation of an house, for a long time held and enjoyed, and now lately elapsed;" this was deemed insufficient^w: and it afterwards appearing, that the debt intended to have been set off was rent reserved on a lease by indenture, which was not mentioned in the notice, the Chief Justice said it was bad on that account also; for if this had been shewn, the plaintiff might probably have proved an eviction, or some other mat-

^{*} Bul. Ni. Pri. 179.

^u 2 Str. 1267. ante 399.

^v 1 T. R. 634. in notis.

^w Bul. Ni. Pri. 179. But

note, this was before the statute 11 Geo. II. c. 19. which gives the action for use and occupation.

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ter to avoid the demand. The notice of set off is usually written underneath the plea, and delivered therewith to the plaintiff's attorney; and a copy of the notice should be kept by the defendant's attorney, it being necessary to prove the delivery of it, at the trial of the cause^x.

The practice of bringing money into court was first introduced in the time of *Kelyng*, Ch. J. to avoid the hazard and difficulty of pleading a tender^y. And it is allowed, in cases where an action is brought upon contract, for the recovery of a debt^z, which is either certain, or capable of being ascertained by mere computation, without leaving any other sort of discretion to be exercised by the jury^a. In these cases, when the dispute is not, whether any thing, but how much, is due to the plaintiff, the defendant may have leave to bring into court any sum of money he thinks fit; and the court will make a rule, that unless the plaintiff accept

^x 1 Crompt. 160.

Hardw. 507.

^y R. H. 5 Jac. I. (a) 2
Saik. 597. 1 Ld. Raym.
255. 2 Str. 787. Cas. temp.

^z 5 Com. Dig. 20.

^a 2 Bur. 1120.

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of it, with costs, in discharge of the action, it shall be struck out of the declaration, and paid out of court, to the plaintiff or his attorney; and the plaintiff, upon the trial, shall not be permitted to give evidence for the sum brought in ^b: which rule should be accompanied with the general issue, or other plea, to the residue of the demand ^c.

Thus in *assumpsit* ^d, or *covenant* ^e for the payment of money, the defendant may bring money into court: and in *covenant* to find diet and lodging, or pay ten pounds, the court allowed him to bring in the ten pounds ^f. In *debt* for rent, the defendant was formerly allowed to bring money into court ^g; as is done in the Common Pleas ^h, and Exchequer ⁱ: but this court refused it, in the time of Lord *Hardwicke* ^k; and in a case previous to that time ^l, the court said they never did it in *debt*. But there is a distinction between those actions of debt, wherein

^b Say. Rep. 196, 7. 2 Bur. 284.

1121. 3 Bur. 1773. Imp.
K. B. 261, 2.

^c Barnes, 339, 350.

^d 1 Vent. 356. 2 Salk. Reg. 257.
596, 7.

^e 2 Salk. 596. 1 Will.
75. 2 Bur. 1120. Barnes,

^f 8 Mod. 305.

^g 2 Salk. 596, 7.

^h Barnes, 280, 282. Pr.

ⁱ Bunb. 124.

^k Cas. temp. Hardw. 173.

^l 2 Str. 890.

the

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the plaintiff cannot recover less than the sum demanded, as on a record, specialty, or statute, giving a sum certain by way of penalty^m; and those actions, wherein the plaintiff may recover less, as in debt for rentⁿ, or on a simple contract^o. In the former, the defendant cannot bring money into court^p; though he may move to stay the proceedings, on payment of the whole debt and costs^q: but in the latter, the defendant has been allowed to bring money into court^r; because the plaintiff does not recover according to his demand, but according to the verdict of the jury. And the defendant, by act of Parliament^s, may bring money into court, in debt, covenant, or other action on a policy of assurance. In an action by an executor or administrator, the plaintiff not being liable to costs, the defendant was not formerly allowed to bring money into court^t: but now it is otherwise^u; and the effect of the rule will be, not to make the plaintiff pay, but only to lose his subsequent costs.

^m Cro. Jac. 128, 493, ^r 1 Ventr. 356. 2 Salk.
629. 3 Mod. 41. 596, 7.

ⁿ 5 Mod. 212.

^s Stat. 19 Geo. II. c. 37.

^o H. Blac. 1 V. 249.

3 Bur. 1773.

^p 2 Str. 890. Barnes, 285.

^t 2 Salk. 596.

^q *Ante* 288, &c.

^u 2 Str. 796.

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On a plea of tender, with a *proferat in curia*, the sum tendered must be paid to the signer of the writs, who will give a receipt for it in the margin of the plea^v; and if not so paid, the plaintiff may consider the plea as a nullity, and sign judgment^w. And as a tender cannot be pleaded, so the defendant cannot bring money into court, in an action for general damages, upon a contract^x, or for a tort^y, or trespass^z. But in an action of *assumpsit* against a carrier, for not delivering goods, the defendant having advertised that he would not be answerable for any goods beyond the value of twenty pounds, unless they were entered and paid for accordingly, the court allowed him to bring the twenty pounds into court^a. And where, in an action for general damages, the bringing of money into court is irregular, if the plaintiff take it out, he thereby waives the irregularity, and cannot afterwards have a verdict, unless he recover more than the sum brought in^b. In actions against justices of the peace^c, or officers of

^v Imp. K. B. 268.

^b 1 T.R. 710.

^w 1 Str. 638.

^c Stat. 24 Geo. II. c. 44.

^x 1 Ventr. 356.

§ 4. and note, this seems to

^y 2 Str. 767, 906.

have been the first statute,

^z 2 Will. 115.

which allows money to be

^a *Hutton v. Bolton*, E. 22
Geo. III.

brought into court, in an
action for general damages.

the

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the excise^d or customs^e, for any thing done in the execution of their offices, “in case the
“defendants shall have neglected to tender
“any, or shall have tendered insufficient,
“amends, before the action brought, they
“may, by leave of the court, at any time be-
“fore issue joined, pay into court such sum
“of money as they shall see fit; whereupon
“such proceedings, orders, and judgments
“shall be had, made, and given, in and by
“such court, as in other actions where the
“defendant is allowed to pay money into
“court.”

Where there are several counts or breaches in the declaration, and as to some of them the defendant may bring money into court, but not as to the others, he may obtain a rule for bringing it in specially, upon some of the counts or breaches only. Thus, where an action of *covenant*^f was brought upon a lease, for non-payment of rent, and not repairing, &c. the court made a rule, that upon payment of what should appear to be due for rent, the proceedings as to that should be stayed; and as to the other breaches, that

^d Stat. 20 Geo. II. c. 70. § 33. ^f 2 Salk. 596. 1 Wils. 75. Barnes, 350. 1 Ventr. 356.

^e Stat. 24 Geo. III. Sess. 2. c. 47. § 35. *contra.* and see Pr. Reg. C. P. 256.

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the plaintiff might proceed as he should think fit. So, in *covenant* upon a charter-party^s, the defendant was allowed to bring money into court, upon two of the breaches only; viz for freight and demurrage. If a defendant bring money into court, upon some of the counts, and the plaintiff take it out, the latter is only entitled to the costs of those counts^h.

The motion for leave to bring money into court is a motion of course, and should regularly be made before plea pleadedⁱ; but it is frequently made^k, and in some cases expressly authorized^l, *after* plea, on obtaining a judge's order for that purpose. And if there has been no delay^m, the court will give the defendant leave to withdraw the general issue, in order to bring money into court, and re-plead it, on payment of costs. The motion paper being signed by counsel, the money should be paid to the signer of the writsⁿ, who acts in this instance as deputy to the master^o; and will give a receipt for the mo-

^s 2 Bur. 1120.

^l Stat. 24 Geo. II. c. 44. § 4.

^h 4 T. R. 579.

^m 2 Str. 1271. Barnes,

ⁱ 1 Will. 157. Barnes, 287, 362.

279.

ⁿ Imp. K. B. 260.

^k 1 T. R. 711.

^o 1 Crompt. 148.

ney,

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ney, on being paid 20 s. for every 100 l. and so in proportion for every greater or lesser sum exceeding 10 l. and 2 s. for every sum under 10 l. besides 2 s. 4 d. for the receipt ^p: which receipt being carried, with the motion paper, to the clerk of the rules, he will draw up the rule, in term time; but in vacation, there must be a judge's order, for drawing up the rule, which is granted of course, without a summons ^q.

The rule to bring money into court is commonly drawn up on payment of costs, to be taxed by the master; and a copy of it being served, which is usually annexed to the plea, if the plaintiff be willing to accept the sum brought in and costs, in discharge of the action, he should get an office copy of the rule ^r, and an appointment thereon from the master, to tax the costs, and give notice of the appointment to the defendant's attorney ^s. The costs being taxed and demanded, the plaintiff, if they are not paid, must proceed in the action, and cannot have an attachment ^t: for the rule in this court is merely conditional, and not, as in the Common Pleas ^u,

^p R. H. 5 Jac. I.

^q Imp. K. B. 260.

^r *Id.* 259.

^s 4 T. R. 12.

^t 2 Str. 1220.

^u Barnes, 283. Pr. Reg. 259. S. C.

obligatory

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obligatory upon the defendant to pay the costs. But where the plaintiff's conduct appeared to be oppressive, the court on motion discharged so much of the rule, for bringing money into court, as related to the payment of costs ^v: And where the defendant, after action brought and before declaration, has tendered the sum, which he afterwards brings into court, and offered to pay the costs up to that time, it seems but reasonable that he should not be liable to the payment of any further costs.

Bringing money into court is an acknowledgment of the right of action, to the amount of the sum brought in ^w; which the plaintiff, on producing an office copy of the rule, is entitled to receive at all events, whether he proceed in the action or not, and even though he be non-suited, or have a verdict against him ^x: And being an acknowledgment on record, the party can never recover it back again, though it afterwards appear that he paid it wrongfully ^y. But beyond the amount of the sum brought in, bringing money into court is no acknowledgment of the right of

^v 1 Bur. 578.

Caf. temp. Hardw. 206.

^w 5 Bur. 2640. 2 T. R.

S. C. Pr. Reg. 250. Caf. Pr.

275.

C. P. 36. S. C.

^x 2 Salk. 597. 2 Str. 1027.

^y 2 T. R. 645.

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action²; and therefore if the plaintiff proceed further, it is at his peril. If he proceed to trial³, otherwise than for the non-payment of costs, and do not prove more to be due to him, than the sum brought in, the plaintiff, on producing the rule^b, shall be non-suited, or have a verdict against him, and pay costs to the defendant^c: But if more appear to be due to him, he shall have a verdict for the overplus, and costs^d. Where the plaintiff proceeds further, without going on to trial, he shall have his costs, to the time of bringing money into court; and the defendant be allowed his subsequent costs^e. After the defendant had brought money into court, the plaintiff proceeded to trial, and a juror being withdrawn by consent, it was held that the plaintiff was not entitled to costs, up to the time of bringing the money into court^f.

² 1 T. R. 464.

^c 4 T. R. 10. 1 T. R.

³ 2 Salk. 597. 2 Str.

710. *semb. contra.*

1027. Cas. temp. Hardw.

^d Cas. temp. Hardw. 260.

206. S. C. Say. Rep. 196,

^e 1 T. R. 629. Say. Rep.

7. 2 Bur. 1121.

196. *contra.*

^f 5 Com. Dig. 20.

¹ 3 T. R. 657.

C H A P. XXIX.

Of Replications, and other subsequent Pleadings.

WHEN the defendant has put in his plea, he may rule the plaintiff to reply, by obtaining a rule from the master, on the back of the plea; which is entered with the clerk of the rules, and a copy served on the plaintiff's attorney. This rule may be given, at any time in term, or within sixteen days afterwards^a; but if not given till four terms have elapsed, after plea pleaded, the plaintiff must have a term's previous notice, of the defendant's intention to give it, unless the cause hath been stayed by injunction or privilege^b. The notice in such case must be given before the effoign day of the term^c; and it is usual to give the rule, on the day after the term is expired^d. The rule to reply expires in four days exclusive after service; and *Sunday*, or

^a Imp. K. B. 287.^c 2 Str. 1164.^b R. T. 5 & 6 Geo. II. (3).^d Imp. K. B. 287.

any holiday on which the court does not sit, or the office is not open, if it be not the last, is to be accounted a day within the rule^e. If the plaintiff be not ready to reply, within the time limited by the rule, he may take out a summons, and obtain an order, for further time^f.

Within the time limited by the rule to reply, or order for further time, the plaintiff either joins issue on the plea; or, admitting the law and fact contained in it, he *discontinues* his action, enters a *nolle prosequi* or *cassetur billa vel breve*, or, in an action against an executor or administrator, takes judgment of assets *in futuro*, &c.; or, admitting the fact, he denies the law by a *demurrer*; or, admitting the law, he denies the fact, or confesses and avoids it, or concludes the defendant by matter of estoppel.

If the plaintiff perceive that he cannot maintain his action, it is usual for him to take out a rule for leave to discontinue. *Discontinuance*, in a civil suit, is either of process or of pleading: The former, before judgment, is the act of the clerk, but, after judg-

^e R. T. 1 Geo. II. (a).

^f Imp. K. B. 287.

ment,

ment, it is the act of the court^g; the latter, of which something has been already said^h, is the act of the party. The process, or proceedings in a suit, should be regularly continued from term to term, or from one day to another in the same termⁱ, between the commencement of the suit and final judgment; and if there be any lapse, or want of continuance, that is not aided, the parties are out of court, and the plaintiff must begin *de novo*. Before declaration, there is, properly speaking, no continuance^k; though we have seen^l, that the parties by consent might have obtained a day before declaration, which was called a *dies datus prece partium*: After declaration, and before issue joined, the proceedings are continued by *imparlance*; after issue joined, and before verdict, by *vicecomes non misit breve*; and after verdict, or demurrer, by *curia advisari vult*. In this court, the practice is never to enter continuances, till the plea-roll is made up, though the declaration be of four or five terms standing^m: and after

^g Cart. 51. 1 Salk. 177.

^k Gilb. C. P. 40.

^l Wilf. 40. *Id.* 303. cites

^h *Ante*, 218, 19.

Comyns, 419.

^m 1 Salk. 179. 2 Ld.

^h *Ante*, 393, 4.

Raym. 872. S. C.

ⁱ 1 Str. 492. 1 Wilf. 40.

plea pleaded, though the plaintiff have day to reply for several terms, yet no mention need be made, on the roll, of any imparlance or continuanceⁿ. After judgment by default, and writ of inquiry awarded, there is no subsequent continuance, between the parties, in the Common Pleas^o; but in this court it is otherwise. The want of a continuance is aided by the appearance of the parties^p: and as a discontinuance can never be objected *pendente placito*^q, so, after judgment, it is cured by the statute of jeofails^r. It has even been holden, that a continuance may be added, after judgment in a *penal* action^s; but then, there must be something to amend by^t.

A rule to discontinue may be had either before or after declaration^u; and it is usually granted upon payment of costs^v. An executor or administrator is liable to costs upon a discontinuance, where he has knowingly brought a wrong action^w: but where that is not the case, he may have leave to disconti-

ⁿ 5 Co. 75.

^o 11 Co. 6. b. Yelv. 97.

^p 1 Rol. Abr. 486.

^q 1 Willf. 40.

^r Cro. Jac. 211.

^s 32 Hen. VIII. c. 30 Cro. Eliz. 489. Cro. Jac. 528.

^t 2 Str. 1227.

^u 1 Willf. 303.

^v R. M. 10 Geo. II. (b).

^w Comb. 299.

^x Caf. Pr. C. B. 79.

^y 3 Bur. 1451. 1 Blac. Rep. 451. S. C.

nue, without paying costs^x. The rule to discontinue is a *side bar* rule, and may be had, as a matter of course, from the clerk of the rules, at any time before a *general* verdict^y, or the court have given judgment upon demurrer^z: And even after a *special* verdict, the plaintiff may discontinue, by leave of the court, because that is not complete and final; but in this case it is a great favour^a: And it is never granted after a *general* verdict^b, or writ of inquiry executed and returned^c, or after a peremptory rule for judgment on demurrer^d. Upon a rule to discontinue, the plaintiff is to get an appointment from the master, to tax the costs, and serve a copy of it on the defendant's attorney: The costs, being taxed, are to be forthwith paid; for otherwise the rule, being conditional, is no stay of proceedings^e. In *replevin*, the avowant, though an actor, cannot have a rule to discontinue^f; and where the rule is obtained by unfair practice, the court will discharge it^g.

^x 4 Bur. 1927.

^y 1 Salk. 178.

^z 1 Str. 76, 116.

^a 1 Salk. 178.

^b *Id. ibid.*

^c Carth. 86.

^d 1 Salk. 179.

^e Imp. K. B. 640, 1.

^f 1 Str. 112.

^g 4 Bur. 2502.

422 Of entering a Nolle Prosequi.

A *nolle prosequi* is an acknowledgment or agreement, by the plaintiff, that he will not further prosecute his suit, as to the whole or a part of the cause of action; or, where there are several defendants, against some or one of them^h; and it is in nature of a *retraxit*ⁱ, operating as a release or perpetual bar^j.

On a plea of *coverture*, &c. if the plaintiff cannot answer it, he may enter a *nolle prosequi*, as to the whole cause of action; but the defendant, in such case, is entitled to costs, under the 8 Eliz. c. 2. § 2^k. So if the defendant demur to one of several counts of a declaration, the plaintiff may enter a *nolle prosequi*, as to that count which is demurred to, and proceed to trial upon the other counts^l; or if judgment be given for him on the demurrer, he may enter a *nolle prosequi* as to the issue, and proceed to a writ of inquiry on the demurrer^m. But after a demurrer for *misjoinder*, the plaintiff cannot cure it, by entering a *nolle prosequi*ⁿ. And after demurrer to a declaration, consist-

^h Cro. Car. 239, 243.

^k 3 T. R. 511.

² Roll. Abr. 100.

^l 2 Salk. 456.

ⁱ Hardr. 153.

^m 1 Salk. 219. 2 Salk.

^j 8 Co. 58. Cro. Jac. 211. 456. 1 Str. 532, 574.

⁶ C.

ⁿ H. Blac. 1 V. 108.

ing of two counts, against two defendants, because one of them was not named in the last count, the plaintiff cannot enter a *nolle prosequi* on that count, and proceed on the other^o.

If there be a *demurrer* to part, and an issue upon other part, and the plaintiff prevails on the demurrer, it was in one case holden, that without a *nolle prosequi* as to the issue, he cannot have a writ of inquiry on the demurrer; because on the trial of the issue, the same jury will ascertain the damages, for that part which is demurred to^p. But, in a subsequent case^q, where the declaration consisted of four counts, to three of which there was a plea of *non assumpsit*, and a demurrer to the fourth; and after judgment on the demurrer, the plaintiff took out a writ of inquiry, and executed it; this was moved to be set aside, there being no *nolle prosequi* on the roll; and it was insisted, that the plaintiff ought to take out a *venire*, as well to try the issue, as to inquire of the damages upon the demurrer: *Sed per curiam*, that is indeed the course, where the issues are carried down to trial, before the demurrer is determined, and in that case the

^o 4 T. R. 360.

^q 1 Str. 532. 8 Mod. 108.

^p 1 Salk. 219. 12 Mod. S. C.

558. S. C.

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jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover all he goes for, upon that count, there is no reason why we should force him to carry down the record to *nisi prius*: and as to the want of a *nolle prosequi* upon the roll, he may supply that, when he comes to enter the final judgment; if not, you will have the advantage of it upon a writ of error. The judgment upon the inquiry must stand.

In *trespafs*, or other action for a wrong, against several defendants, the plaintiff may, at any time before final judgment, enter a *nolle prosequi* as to one defendant, and proceed against the others^r: and so in *assumpsit*, or other action upon contract, against several defendants, one of whom pleads bankruptcy, or other matter in his personal discharge, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the other defendants^s. But a *nolle prosequi* cannot be entered as to one defendant, after final judgment against the others^t: and it seems that in *assumpsit*, or other action upon contract, against several defendants, the plaintiff cannot enter a *nolle*

^r Hob. 70. Cro. Car. 239, 244, 5. 1 Will. 306.

243. 2 Rol. Abr. 100. 2 ^s 1 Will. 89.

Salk. 455, 6, 7. 3 Salk. ^t 2 Salk. 455.

prosequi

prosequi as to one, unless it be for some matter operating in his *personal* discharge, without releasing the others^v. In entering a *nolle prosequi*, the plaintiff need not be amerced *pro falso clamore*: but it is sufficient, that the defendant be put without day^v.

On a plea in *abatement*, if the plaintiff cannot deny the truth of the matter alledged, and it is sufficient in law to quash the bill or writ, he may enter a *cassetur billa vel breve*; or in other words, pray that the bill or writ may be quashed, to the intent that he may exhibit, or sue out a better bill or writ, against the defendant: and upon such entry, the defendant is not entitled to costs.

In an action against an *executor* or *administrator*, if the defendant plead *plene administravit*, and it cannot be proved that he has assets in hand, the plaintiff may confess the plea, and take judgment of assets *in futuro*; which is an interlocutory or final judgment, according to the nature of the action; and if it be only interlocutory, there must be a writ of inquiry to complete it. So in an action against an insolvent debtor, or fugitive, whose future effects remain liable to the payment of his debts, the plaintiff may take judgment for his demand, to be levied of those effects^w.

^v 1 Will. 89.

^w 1 T. R. 80.

^v 1 Str. 574.

A replication, denying the truth of the plea, is either in denial of the whole, or a part of it; and such denial is either direct and immediate, or consequential to, and preceded by an inducement: the latter mode of denial is called a traverse.

When the defendant's plea doth consist merely of matter of fact, triable by the country, in excuse or justification of the injury complained of, as where the defendant, in trespass and assault, pleads *son assault demefne*, or justifies in an action for *words*, there the plaintiff may reply generally, that the defendant committed the injury of his own wrong, and without any such cause as the defendant hath alledged; which puts the whole cause or matter of the plea in issue, and is called a replication *de injuriâ suâ propriâ, absque tali causâ* *. But where the plea consists of matter of record, as well as matter of fact, or the defendant claims, in his own right or as servant to another, any interest in the land, or any common or rent issuing out of the land, or a way or passage over it, there *de injuriâ*, &c. generally is not a good replication *; but the plaintiff must either deny the matter of record, or traverse the title

* *Cragoe's case*, 8 Co. 67.

specially,

specially, or admitting the matter of record or title, he must reply, that the defendant committed the injury of his own wrong, and without the *residue* of the cause alledged by the defendant. So if the defendant, without claiming any interest in the land, justify under an authority derived *immediately* or *mediately* from the plaintiff, or by authority of law, *de injuriâ*, &c. generally is not a good replication.

Where there is an express affirmative and negative, or a full confession and avoidance, a traverse is unnecessary and superfluous. But where there are two affirmatives, or a confession and avoidance by argument only, it is necessary to add a traverse.

A traverse is a denial of the whole, or most material point of the adversary's pleading, or, if there are several points equally material, of one of them; and it should consist of some matter of fact, triable by the country, either expressly alledged, or necessarily implied. Matter of inducement therefore, or conveyance to the action, a mere suggestion, surmise or supposal, the time and place, or what is alledged under a *scilicet*, if immaterial, is not allowed to be traversed; nor matter of law, or mere legal inference; matter of intention,

tention, which is not triable, as the *sciens* in an action of deceit; matter of record, which is not triable by the country; or any other matter, which is not expressly alledged, or necessarily implied. But matter of inducement, &c. is traversable, if material.

Every traverse ought to have a proper inducement; and if that be bad, the traverse is insufficient: But the inducement to a traverse does not require much certainty, though the traverse itself should be certain, and neither too large nor too narrow, that is, it should deny so much as is material, and no more. The proper words for beginning a traverse, are *absque hoc*; but any words tantamount are sufficient, as *et non*: And it ought not to conclude to the country, unless it comprise the whole matter of the plea. There cannot be a traverse after a traverse, where the first was apt and material: But it is otherwise, where the first traverse was not to the point of the action, or immaterial. And the king is allowed to take a traverse after a traverse, where his title appears by office, or other matter of record.

The want of a necessary traverse, or a traverse that is unnecessary and superfluous, is merely form, and aided after verdict, on a general

Of Confession and Avoidance. 429

neral demurrer, or by pleading over. A traverse improperly taken is also aided in like manner; as where it is without an inducement, or of an immaterial point, or one that is not the most material, or too large, or too narrow, or after a former traverse ^y.

If the plaintiff cannot deny the truth of the plea, he may confess and avoid it, or conclude the defendant by matter of estoppel. Avoidance, we have seen ^z, is either by matter precedent, which is called an avoidance in law, or by matter subsequent, which is called an avoidance in fact. And in general we may observe, that the qualities of a replication are similar to those of a plea: like a plea, it should answer the whole matter alledged, and be single, certain, direct and positive, triable and capable of proof. The only additional quality, required in a replication, is that it be consistent with, and do not depart from the declaration.

Departure in pleading, is when a man quits or departs from the case or defence which he has first made, and has recourse to another; or, in other words, when the replication or

^y For the above rules re- see Com. Dig. tit. *Pleader*,
specifying traverses, and the (G.) &c.
cases which illustrate them, ^z *Ante*, §73.

rejoinder

rejoinder contains matter, not pursuant to the declaration or plea, and which does not support and fortify it^a. Thus, if the declaration be founded on the common law, the plaintiff in his replication cannot maintain it by a special custom, or act of parliament^b. So in an action of *debt*, on an arbitration bond, if the defendant pleads no award made, and the plaintiff, in his replication, sets out an award, and assigns a breach, the defendant cannot rejoin that the award was not tendered^c, or is void^d, or that the defendant hath performed, or been *ready* to perform it^e. So in an action of *debt* on bond, conditioned for the performance of covenants, if the defendant pleads performance, and the plaintiff replies and assigns a breach, the defendant cannot rejoin any matter in excuse of performance^f. But where the rejoinder discloses new matter, in explanation or fortification of the bar, it is no departure^g. Time and place, when material, cannot be departed from; as, in an action

^a Co. Lit. 304. a. 2 Will.
98.

^b Co. Lit. 304. a. 1 Lev.
81. 3 Lev. 48.

^c 1 Lev. 300. 2 Saund.
188. S. C.

^d 1 Lev. 85, 127, 133.
1 Will. 122.

^e 1 Sid. 10.

^f Co. Lit. 304. a. 2 Lev.
67. 1 Salk. 221, 2.

^g 2 Will. 98.

upon

upon a bond^h or promissory noteⁱ, the plaintiff in his replication cannot vary from the day laid in the declaration. So in an action for a local trespass, he cannot reply that it was committed at a different place. But when the time laid in the declaration is immaterial, there, if it become necessary by the defendant's plea, the plaintiff in his replication may depart from it; as in trespass^k, or trover^l, or upon a general *indebitatus assumpsit*^m, where the time becomes material by the defendant's plea of a release, tender, or the statute of limitations, &c. So in actions for a transitory trespass, where the defendant pleads a local justification, the plaintiff, in his replication, may vary from the place laid in the declarationⁿ. The proper mode of taking advantage of a departure, is by demurrer; for if the defendant, instead of demurring to, take issue upon a replication, containing a departure, and it be found against him, the court will not arrest the judgment^o.

^h 1 Salk. 222. 3 Lev. 348.

^m 1 Str. 22. 2 Str. 806.

ⁱ 1 Str. 22. 2 Str. 806.

1 Lev. 110. 1 Keb. 566,

^k Co. Lit. 282. a. b. 1 578. 10 Mod. 251. Fort. Salk. 222. 2 Ld. Raym. 1015. 375. 1 Barnardist. K. B. 54.

^l Cro. Car. 245, 333. 1 Salk. 222.

ⁿ 1 Ld. Raym. 120.

^o T. Raym. 86.

But though a departure is not allowable, yet in many actions, and particularly in trespass, the plaintiff, who has alledged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh, with all its specific circumstances, in such manner, as clearly to ascertain and identify it, consistently with his general complaint; which is called a new or *novel* assignment^p.

A new assignment is either as to time, place, or other circumstances. With respect to time, when the defendant justifies under a right of common, &c. at particular times, the plaintiff may new-assign the trespass, at other times. So in an action of assault and battery, if the defendant plead *son assault demesne*, and there were in truth two assaults, one of which the defendant can justify, and the other not, the plaintiff may new-assign the assault, for which he brought his action^q. But it seems that, without a new assignment, the plaintiff, on the general replication of *de injuriâ suâ propriâ absque tali causâ*, would be permitted to give evidence of the assault, for which he

^p 3 Blac. Com. 311.

Raym. 1015.

^q 6 Mod. 120. 2 Ll.

brought

brought his action, and the defendant must answer it^r.

With respect to the place, it is a rule, that if the plaintiff in trespass give it a name by his writ, the defendant cannot vary from that name: but if the writ be only in general, *quare clausum fregit*, and the plaintiff give a name in his count, this shall not bind the defendant, but he may give the plaintiff another name^s. And it is on all hands agreed, that where the writ and count are both general, the defendant may give the place a name in his plea^t, or he may plead *liberum tenementum* generally, without giving it a name^u. But where the place is made material by the defendant's plea, he must shew it with certainty; as in trespass for taking and carrying away the plaintiff's goods in *D.*, the de-

^r Cro. Car. 514, 15. *Tamen quære*; for in *Bul. Ni. Pri.* p. 17. it is said, that the defendant, in such case, may prove an assault, on any day before the action brought; and the plaintiff cannot give in evidence, a battery at another day, or at another time on the same day, without a *novel* assignment, which must be of a battery on the same day mentioned in the declaration, else it will be a departure.
^s Per *Fairfax*, Just. 22 Ed. 4. 17. 2 *Blac. Rep.* 1090.
^t *Bro. Abr. tit. Trespass,* pl. 277, 360, 366.
^u *Id.* pl. 153.

defendant pleaded that the *locus in quo* was his freehold, and that he took the goods damage feasant, &c. the plaintiff demurred generally, and had judgment; for the action being transitory, there is no *locus in quo* supposed, D. being only alledged for a venue, therefore if the defendant will make the place material, it must come on his part to shew the certainty of it ^v.

If the defendant say, that the *locus in quo* is six acres in D., which are his freehold, and the plaintiff say they are *his* freehold, and in truth the plaintiff and defendant have both six acres there, it was in one case determined, that the defendant cannot give in evidence, that he committed the trespass in his own soil, unless he gave a name certain to the six acres; for otherwise, it is said, the plaintiff cannot make a new assignment ^w. But in a later case ^x, it was determined, that in trespass *quare clausum fregit* in D., if the defendant plead *liberum tenementum*, without giving the close a name, and issue be joined thereupon, it is sufficient for the defendant to shew *any* close there that is his freehold; and therefore,

^v 2 Salk. 453. 6 Mod.
117. S. C.

^x 2 Salk. 453. 6 Mod.
119. S. C.

^w Dyer, 23.

in that case, the better way is to make a new assignment.

As the plaintiff may new-assign the trespass in a different close, so he may new-assign it in another part of the same close: In the latter case, he ought to alledge, in what other part of the close the defendant committed the trespass, as in the *South* or *North* part, so that the difference may be plainly perceived^x. If the defendant justify under a right of way, the plaintiff may either deny the existence of the right claimed by the defendant, or, admitting it, he may new-assign the trespass *extra viam*; or, if he be so disposed, he may deny the right, as well as make a new assignment, by saying that he brought his action, not only for the trespass attempted to be justified, denying the right set forth in the justification, but also for the other trespass *extra viam*. And the plaintiff may make a new assignment, not only as to the time and place, but also as to the mode of committing the trespass; as for instance, in answer to a plea of moderate correction, the plaintiff, by way of new assignment, may say that the defendant beat him immoderately: So where the defendant justifies under a right of common of pasture or

^x Bro. Abr. tit. *Trespass*, pl. 203.

436 Of concluding the Replication, &c.

turbary, &c. the plaintiff may state the trespass to have been committed, on other occasions, and for other purposes, than those mentioned in the plea.

A new assignment, being in nature of a new declaration, should be equally certain; and the defendant may answer it in the same way, either by pleading the general issue of not guilty, or a special justification². But, in answer to a new assignment at a different place, he cannot say that the places mentioned in the plea and new-assignment are the same^a; for by new-assigning, the plaintiff admits the truth of the plea, and is estopped from giving any evidence in the place stated therein, so that if the places are in truth the same, the defendant may take advantage of it, on the general issue of not guilty. Neither can the defendant justify at a different place, and traverse the place mentioned in the new assignment^b.

Where a replication denies the whole substance of the defendant's-plea, there the plaintiff ought to tender an issue, and conclude to

² Bro. Abr. tit. *Trespass*, Eliz. 355, 492, 3.
pl. 168, 359.

^b Bro. Abr. tit. *Trespass*,
^a *Id.* pl. 3, 168. Cro. pl. 168.

Of concluding the Replication, &c. 437

the country^c; and it matters not whether the replication, in such case, be with or without a traverse, for where a traverse comprises the whole matter of the plea, the replication may still conclude to the country^d. But where a particular fact is selected and denied, the conclusion seems to depend on the form of the replication: If it be so framed, as simply to deny the fact, without any inducement or traverse, it ought to conclude to the country^e; but the plaintiff is not always obliged to reply in that way, for in some cases he is allowed, after a proper inducement, to traverse the fact, with an *absque hoc*^f; and where a particular fact is so traversed, the replication should conclude to the court, with an averment and prayer of damages, or of the debt and damages^g. And it is an invariable rule, that wherever new matter is alledged in the repli-

^c 1 Bur. 316. 2 Bur. *Wilkes*, E. 23 Geo. III. 1022. Doug. 94, 428. 2 *semb. contra.*

T. R. 442, 3.

^e *Fen v. Alston*, cited in

^d 1 Salk. 4.

1 Bur. 320, 1. 2 Str. 871.

^e 2 T. R. 439. and the cases there cited of *Bush v. S. C. Doug. 428.*

Leake, T. 23 Geo. III. and ^g Same cases. 1 Bur. 319.

Slater v. Carne, H. 25 Geo. 2 T. R. 442, 3.

III. *accord. Mulliner v.*

cation, it should be concluded with an averment, in order to give the defendant an opportunity of answering it^b. A new assignment concludes, by averring that the trespass newly assigned is another and different trespass, than that mentioned in the plea; wherefore, inasmuch as the defendant hath not answered the trespass newly assigned, the plaintiff prays judgment, and his damages, &c.

In all cases, where the plea was *entered* in the general issue book, or *delivered* to the plaintiff's attorney, the replication should be *delivered* to the defendant's attorney; but otherwise it should be *filed*, in the office of the clerk of the papers: and unless the replication conclude to the country, it should be signed by counsel.

If the plaintiff reply, without joining issue, the defendant may be called upon to *rejoin*; or if there be a new assignment, he may be ruled to *plead* thereto, in like manner as to the original declaration. After a rejoinder, if the parties are not yet at issue, the plaintiff must *sur-rejoin*, the defendant *rebut*, and the plaintiff *sur-rebut*, &c. till issue is joined. The rule for these purposes is given, in like manner as the rule to reply;

^a 2 Will. 65. Doug. 58. 2 T. R. 576.

and if the plaintiff do not reply, sur-rejoin, or sur-rebut, within the time limited by the rule, or order for further time, the defendant may sign a judgment of *non pros*: And it is not necessary for him to demand a replication, &c. the service of the copy of the rule being deemed a demand of itself. The judgment of *non pros* is a final judgment, and signed on a double half-crown stamp; on which the defendant may tax his costs, and take out executionⁱ. If the defendant, on the other hand, neglect to rejoin or rebut, when called upon for that purpose, the plaintiff may strike out the previous pleadings, and sign judgment by default, as for want of a plea^k.

ⁱ Imp. K. B. 471.

^k 5 T. R. 152.

C H A P. XXX,

Of Demurrers, and Amendment.

A Demurrer admits the facts, and refers the law arising thereon to the judgment of the court^a. And it is either to the whole or part of a declaration, or to the plea, replication, &c. When there are several counts in a declaration, some of which are good in point of law, and the rest bad, the defendant can only demur to the latter; for if he were to demur generally, to the whole declaration, the court would give judgment against him^b. But if a plea or replication, which is entire, be bad in part, it is bad for the whole^c.

Demurrers are *general* or *special*^d: the former are to the *substance*, the latter to the *form* of pleading. Thus, if a defective title be alledged, it is a fault in substance, for which the party may demur generally; but

^a Co. Lit. 71. b. 5 Mod. ^c 2 Saund. 124. 1 Salk. 132. 312. 1 T. R. 40. 3 T. R.

^b 1 Saund. 286. 2 Saund. 374.

380. 1 Will. 248.

^d Co. Lit. 72. a.

if a title be defectively stated, it is only a fault in form, which must be specially assigned for cause of demurrer. Of the same nature is *duplicity*: and it is not sufficient to say that the pleading is double, or contains two matters, but the party demurring must specially shew, wherein the duplicity consists^e.

At common law there were special demurrers, but they were never necessary except in cases of duplicity, and therefore they were seldom practised; for as the law was then taken to be, upon a special demurrer, the party could take advantage of no other defect in the pleadings, but of that which was specially assigned for cause of his demurrer; But upon a general demurrer, he might take advantage of all manner of defects, that of duplicity only excepted; and there was no inconvenience in such practice, for the pleadings being at bar *vivâ voce*, and the exceptions taken *ore tenus*, the causes of demurrer were as well known upon a general demurrer, as upon a special one^f.

Afterwards, when the practice of pleading at bar was altered, this public inconvenience followed from the use of general

^e R. M. 1654 § 17. 1 Hardw. 167.
Salk. 219. Cas. temp. ^f 3 Salk. 122.

demurrers,

demurrers, that the parties went on to argument, without knowing what they were to argue; and this was the occasion of making the statute 27 *Eliz. c. 5.* by which it is enacted, “that after demurrer joined, and entered in any
 “action or suit, in any court of record, the
 “judges shall proceed and give judgment, according as the very right of the cause and
 “matter in law shall appear to them, without
 “regarding any imperfection, defect, or want
 “of form, in any writ, return, plaint, declaration, or other pleading, process, or course
 “of proceeding whatsoever, except those
 “only, which the party demurring shall specially and particularly set down and express,
 “together with his demurrer.” This statute, by making known the causes of demurrer, was so far restorative of the common law^a; and as a general demurrer before, did confess all matters formally pleaded, so by this statute, whenever the right sufficiently appeared to the court, it confessed all matters, though pleaded informally^b. But there were still many defects and imperfections, which were not aided, as form, upon a general demurrer; to remedy which, it was enacted, by the statute 4 & 5 *Ann. c. 16.* “that no advantage or ex-

^a 3 *Salk.* 122.^b *Hob.* 233.

“ception

“ception shall be taken of or for an immate-
“rial traverse, the default of entering pledges
“upon any bill or declaration, the default of
“alleging a *profert in curiâ* of any bond,
“bill, indenture, or other deed, mentioned
“in the declaration or other pleading, or of
“letters testamentary, or letters of admini-
“stration; the omission of *vi et armis* or *contra*
“*pacem*, the want of averment of *hoc paratus*
“*est verificare*, or *hoc paratus est verificare per*
“*reccrdum*, or not alleging *prout patet per*
“*recordum*; but the court shall give judg-
“ment, according to the very right of the
“cause, without regarding any such imper-
“fections, omissions, and defects, or any
“other matter of like nature, except the
“same shall be specially and particularly set
“down, and shewn for cause of demurrer;
“notwithstanding the same might have here-
“tofore been taken to be matter of substance,
“and not aided by the statute of Queen
“Elizabeth, so as sufficient matter appear
“in the pleadings upon which the court
“may give judgment, according to the very
“right of the cause.” Since the making of
these statutes, the party on a general demurrer,
can only take advantage of defects in sub-
stance; and therefore, if the defects be not
I clearly

clearly of that nature, it is safest to demur specially, in which case he may not only take advantage of such defects, but also of any others, that are specially set down.

All demurrers, whether general or special, must be signed by counsel; and general demurrers to the declaration are delivered, on treble penny stamp paper, to the plaintiff's attorney; but special demurrers, or general demurrers after special pleas, are filed in the office of the clerk of the papers, who makes copies of them. The defendant, we may remember, cannot waive a general demurrer to the declaration; but a special one may be waived, after the book is made up, unless the defendant has been previously ruled, and elected to abide by it.

When either party demurs, the other, in due time, joins in demurrer and proceeds to argument, amends, discontinues, or enters a *nolle prosequi*¹.

Amendments are either at common law or by statute². At common law there was very little room for amendments; for, ac-

¹ Co. Lit. 72. a. R. M.

² 1 Str. 137.

1654. § 17.

according to *Britton*, the judges were to record the *parols*, or pleadings, deduced before them in judgment; but they were not to erase their records, nor amend them, nor record against their inrolment¹, &c. All mistakes however were amendable, at common law, during the same term^m; and afterwards, an amendment was in some instances permitted, as in the recital of a writ, or entry of an *essoign*, or continuancesⁿ, &c. So at common law, when the pleadings were *ore tenus* at the bar of the court, if any error was perceived in them, it was presently amended^o. Afterwards, when the pleadings came to be in paper, it was thought but reasonable, that the parties should have the like indulgence^p. And hence it is now settled^q, that whilst the pleadings are in paper, and before they are entered on record, the court on motion, or a judge at chambers, will amend the declaration^r, plea^s, replication^t, &c. in form or in substance, on proper and equitable terms.

¹ 4 Inst. 255. Gilb. C. P. 114, 15.

107.

² 1 Salk. 47. 3 Salk. 31.

^m Gilb. C. P. 108.

^r 1 Will. 7.

ⁿ *Id.* 108, 9.

^s *Id.* 223.

^o 10 Mod. 88. 1 Str. 11.

^t *Id.* 76.

^p 2 Salk. 520. Gilb. C. P.

The declaration may be amended, by altering the *venue* ^u, &c. and it may be so amended, even after a plea in abatement ^v, or of *null tiel record* ^w. But after plea pleaded, or after the end of the second term, from the return of the writ, the plaintiff is not allowed to add a new count to his declaration, under pretence of amending it ^x: And a new right of action is considered, in this respect, as a new count ^y. Yet where the plaintiffs declared as executors, on a promise to their testator, and issue was joined on a plea of the statute of limitations; the court, after two terms, permitted the plaintiffs to amend, by laying the promise to have been made to themselves ^z. But the amendment in this case was under particular circumstances; and if it had not been allowed, the action would have been

^u 2 Barnardist. K. B. 153. Salk. 52. 6 Mod. 263. 310.
² Str. 1162. 1202. 1 Willf. S. C. *semb. contra*.
 173. Say. Rep. 150, 294. ^x R. M. 10 Geo. II. (b.)
^v 1 Salk. 50. 1 Ld. Raym. 1 Willf. 149. Say. Rep. 97,
 669. S. C. 1 Str. 11. 2 Str. 151, 234.
 739. 2 Ld. Raym. 1472. ^y 1 Willf. 149. Say. Rep.
 S. C. Caf. *temp.* Hardw. 234.
 44. but see 1 Salk. 50. 2 ^z 2 Str. 890. Fitzgib.
 Ld. Raym. 859. S. C. *Id.* 193. 1 Barnardist. K. B.
 1307. *contra*. 408, 418. S. C.
^w 1 Willf. 87. but see 1

lost, by the running of the statute of limitations ^a.

Before plea, there are no costs payable upon amending the declaration, except the costs of the application; and the declaration may be amended, in matter of *form*, after the general issue pleaded, and before entry, without paying costs or giving an imparlance ^b: but if the amendment be in matter of *substance*, or after the general issue is entered ^c, or a special plea pleaded ^d, the plaintiff must pay costs or give an imparlance, at the election of the defendant. On amending the declaration, after plea pleaded, the defendant is at liberty to plead *de novo*, and has two days allowed him for that purpose, after the amendment made, and payment of costs ^e; and if a rule to plead be entered, the same term the amendment is made, though before such amendment, it is sufficient; otherwise a new rule to plead must be entered ^e.

The reason of not permitting a new count to be added, or right of action alledged, after

^a 1 Will. 149. Say. Rep. 235, 6.

^b R. M. 10 Geo. II. reg. 2. (b.)

^c *Id.* Sty. P. R. 20. 2 Str. 950.

^d 2 Str. 890. Lofft, 155.

^e 1 Salk. 517, 518, 520.

R. M. 10 Geo. II. reg. 2. (b.)

the end of the second term, is that the plaintiff is obliged to declare within two terms; and a new count, or right of action, is considered as a new declaration^f. But this reason is not applicable to pleas, or replications, &c. which may be amended at any time, so long as they are in paper. Thus, where the defendant in *trespass* pleaded two pleas, in *Hilary* term; and in *Trinity* term, after issue joined, obtained a rule to shew cause, why he should not have leave to amend his two pleas, and to add a third plea; the rule was made absolute, upon payment of costs^g. In like manner, the plaintiff has been allowed to amend, by withdrawing his replication, and replying *de novo*, after a lapse of many terms^h. And in one case, the plaintiff had leave to amend his replication, where issue had been joined upon it, and the cause entered at the assizes, and made a *remanet* for defect of jurorsⁱ.

But where to a plea of specialties outstanding, in an action on simple contract against an executrix, the plaintiffs replied *assets ultra*, which was found for them, but the verdict set aside, the court refused to give them leave to alter their replication, and

^f 1 Will. 223.

756.

^g *Id. ibid.*

ⁱ Say. Rep. 285.

^h Say. Rep. 172. 2 Bur.

reply *fraud*^k; for besides that there had been a trial, it might have been dangerous to permit the alteration; because the defendant, on the former issue, might have paid away *assets*, as knowing the replication could not affect her. So where the plaintiff had been nonsuited, upon a general replication, "that the cause of action arose within six years," the court refused to set aside the nonsuit, and to give the plaintiff leave to reply *de novo*, "that the writ of *latitat* issued within the six years^l."

After a *demurrer*, the court would not formerly permit an amendment to be made, without the consent of the adverse party^m. But of late years, the court have not used the same strictness as formerly, with regard to amendmentsⁿ; and it is much better for the parties, that they should not. Hence it is now settled, that after a demurrer, or joinder in demurrer, either party is at liberty to amend, as a matter of course, whilst the proceedings are in paper^o: Indeed the very intent of requiring mistakes, in point of form,

^k 2 Str. 1002.

Ld. Raym. 679. S. P.

^l 5 Bur. 2692, 3.

ⁿ 2 Bur. 756.

^m 1 Ld. Raym. 310. *Id.*

^o 2 Salk. 520. Gilb. C. P. 668. 1 Salk. 50. S. C. 1 114, 15.

to be shewn for cause of demurrer, was to give the party an opportunity of amending ^p. And even where the proceedings are entered on record ^q, and the demurrer has been argued ^r, the court will give leave to amend, where the justice of the case requires it, and there is any thing to amend by. The court however will always take care, that if one party obtain leave to amend, the other party shall not be prejudiced nor delayed thereby ^s.

Upon similar grounds, the court will sometimes give a party leave to *withdraw* his demurrer, after it has been argued, and to plead or reply *de novo*, in order to let in a trial of the merits ^t. Thus, after a demurrer to the defendant's plea had been argued, and the matter stood over for the judgment of the court, a rule was made to shew cause, why the plaintiff should not have leave to withdraw his demurrer, and reply to the plea; which rule, no cause being shewn, was afterwards made absolute ^u.

^p 2 Str. 846.

^q *Id. ibid.* 1 Barnardist. K. B. 213, 220. S. C.

^r 2 Saund. 402. 2 Str. 735, 954, 976. Cal. temp.

Hardw. 42. S. C. 1 Bur. 321,

2. Doug. 330. Barnes, 9. 21, 25.

^s 2 Bur. 756.

^t Doug. 385, 452.

^u Say. Rep. 316.

But

But this is altogether discretionary in the court. Therefore where, to an action of debt upon a bail bond, the defendant pleaded there was no bill of *Middlesex*, and the plaintiff demurred, the court, after delivering their opinion in favor of the defendant, refused to give the plaintiff leave to withdraw his demurrer, and amend^v: And by *Wright*, Just. It is not usual to amend, after a demurrer has been argued, and the opinion of the court is known: and it is certainly improper to give leave in the present case, it being an action against bail, whom the court is always inclined to favor. So where the defendant rejoined to several replications in trespass, and demurred to others, and a verdict was found for him upon the issues in fact, and contingent damages assessed upon the demurrers, which were afterwards over-ruled; the court refused to let the defendant withdraw his demurrers, and plead to issue^v: And by *Denison*, Just. Where the demurrer is first argued, before any trial of the issues, the court will give leave to amend; as in the case of *Giddins v. Giddins*^x: But this is an attempt to amend issues in law, after a ver-

^v Sav. Rep. 116, 17.

^x Say. Rep. 316.

^v 1 Bur. 321, 2.

dict has been found, on the issues in fact, and contingent damages assessed; of which there never was an instance. And we do not know where it would end; nor how the cause could be again carried down to trial. The court cannot help seeing that this is upon record: here are verdicts, and contingent damages found. The cases of amendment cited are where the whole is supposed to be in paper; or else the court could not have done it. We have no authority to do this, after 'tis plainly upon record.

Whilst the proceedings are *in paper*, the amendment is at common law; and not within any of the statutes of amendments, which extend only to proceedings of record^y. And there is no difference, as to the doctrine of amending at common law, between *civil* and *criminal* cases^z; nor between *penal* and other actions^a. Thus, in a *qui tam* action for usury, the plaintiff was permitted to amend his declaration, by altering the date of the note, after issue joined and entered on the roll, and after many terms had elapsed, since the commencement of the action^b.

^y 1 Salk. 47. 3 Salk. 31. ^a 1 Str. 137. 2 Str. 1227.

^z 1 Salk. 51. 2 Ld. Raym. 1 Wilf. 256. 1 Bur. 402.
1068. 6 Mod. 285. S. C. ^b 2 Bur. 1098, 9.

And

And a similar amendment was permitted, in a subsequent case, after the record had been made up for trial, and withdrawn, upon discovery of the mistake^e. But in a still later case, where a *qui tam* action for usury had been depending four years, the court in their discretion would not allow amendments to be made in the declaration, though the pleadings were still in paper^d.

When the proceedings are entered *on record*, the court will amend no farther than is allowable by the statutes of amendments^e. By the first of these statutes, (14 *Ed. III.* c. 6.) the justices are impowered, on the challenge of the party, to amend the *process*, where the clerk has made a mistake, in writing a letter or syllable too much or too little. The judges construed this statute so favourably for suitors, that they extended it to a *word*^f. And by the 9 *Hen. V.* stat. 1. c. 4. it is declared, that they shall have the same power, as well *after* as *before* judgment, as long as the record and process is before them. This statute is confirmed by 4 *Hen. VI.* c. 3. with a proviso, that it shall not extend to process of

^e 5 Bur. 2833, 4.

Gilb. C. P. 114, 15.

^d 2 T. R. 707.

^f 8 Co. 157. a.

^e 1 Salk. 47. 3 Salk. 31.

outlawry, &c. By the 8 *Hen. VI. c. 12.* the justices are farther impowered to examine and amend, what they shall think, in their discretion, to be the misprision of their clerks, in any record, process, word, plea, warrant of attorney, writ, panel, or return: and by the 8 *Hen. VI. c. 15.* they may amend the misprisions of their clerks, and other officers, as sheriffs, coroners, &c. in any record, process, or return before them, by error or otherwise, in writing a letter or syllable too much or too little. These are, properly speaking, the only statutes of *amendments*^s; and they do not extend to *criminal cases*, or *penal actions*^h.

In order to amend upon these statutes, it is a general rule, that there must be something to amend by. It has however been determined, in compliance with this rule, that the original writⁱ, or bill^k, is amendable by the instructions given to the officer; the declaration by the bill^l; the pleadings, subsequent to

^s 1 Salk. 51. The rest, 564. 1 Salk. 49. S. C. beginning with the 32 *Hen. VIII. c. 30.* are statutes of Barnes, 10, 16, 22.
Je fails. ^k Barnes, 3, 11, 16, 24, 26.

^h *Id.* 2 Ld. Raym. 1307. ^l 1 Str. 583. 2 Str. 954, 1151, 1162, 1271. Say.

ⁱ 8 Co. 161. 1 Ld. Raym. Rep. 294.

the declaration, by the paper book ^m, or draft under counsel's hand ⁿ; the *nisi prius* roll by the plea roll ^o; the verdict, whether general or special, by the plea roll ^p, memory ^q or notes ^r of the judge, or notes of the associate or clerk of assize ^s; and if special, by the notes of counsel ^t, or even by an affidavit of what was proved upon the trial ^u; the judgment by the verdict ^v; and the writ of execution by the judgment ^w.

^m 8 Co. 161. b. Palm. ^r 2 Str. 1197. 1 Willf. 404, 5. Latch, 58, 86. 33. S. C. Doug. 376, 673, S. C. Cro. Car. 144. 1 Salk. 722, 745. 3 T. R. 749. 50, 88. 2 Ld. Raym. 895. Barnes, 478.

S. C. ^s Cro. Car 145. 1 Salk.

ⁿ Cro. Eliz. 258. 2 Str. 47, 8. 1 Ld. Raym. 138. S. C. 846. 1 Barnardist. K. B. 1 Salk. 53. 1 Ld. Raym. 213, 220. S. C. 335. 1 Barnardist. K. B.

^o 8 Co. 161. b. Cro. 191. 1 Bac. Abr. 101. Car. 203. 1 Salk. 43. 1 Ld. Gilb. C. P. 163.

Raym. 94. 12 Mod. 107. ^t 1 Rol. Rep. 82. Rol. Comb. 393. S. C. 2 Str. Abr. 207. pl. 15. 1 Salk. 1264. Say. Rep. 76. Barnes, 47, 8. 53.

14. but see 1 Ld. Raym. ^u 1 Str. 514. 8 Mod. 49. 511. S. C.

^p 1 Ld. Raym. 133. ^v 2 Str. 737. 3 T. R.

^q Cro. Car. 338. Gilb. 349.

C. P. 164. 1 Bac. Abr. ^w Say. Rep. 12. 2 Blac. 101. Bal. Ni. Pri. 320. Rep. 836. 2 T. R. 737. 3 Barnes, 6, 449. T. R. 657.

The amendment may be made in any stage of the proceedings; and those things which are amendable *before* error brought, are amendable *afterwards*, so long as diminution may be alledged, and a *certiorari* awarded^a. After error brought in this court, on a judgment of the Common Pleas, the amendment may be made here^y, or in the court below^z. If it be made in the court below, a *certiorari* may be had, on alledging diminution, to bring up the record in its amended state; or, if the clerk of the treasury of the Common Pleas attend with the record here, this court on motion will order the transcript to be amended by it^a. And this way of amending the transcript here, by the record there, is the course of the court, to save a *certiorari*; for if the record be right below, upon diminution alledged, the party may have a *certiorari* of common right, for bringing it up^b. After error brought in the Exchequer Chamber, upon a judgment of this court, it is necessary to make the amendment here; as this differs

^a 8 Co. 162. 2. W. Jon. a. 2 Rol. Rep. 471.
 9. 3 T. R. 349, 749. and ^z Poph. 102. Hardr.
 see 1 Salk. 209. Cas. temp. 505.
 Hardw. 119. for the time ^a 2 Rol. Rep. 471. Hardr.
 of awarding a *certiorari*. 505.
^y Poph. 102. 8 Co. 162. ^b 1 Salk. 49.

from the case of a writ of error from the Common Pleas, because that court is supposed to send up the very record, but this court sends only a transcript^c. When the record in such case is amended, it is either certified into the Exchequer Chamber, upon diminution alledged^d; or upon carrying it there, by the clerk of the treasury of this court, the Justices and Barons will order the transcript to be amended^e; or the transcript may be brought back, and amended in this court, by the original record^f. If there be any *mistake* in the transcript, by the negligence of the clerk, the court above, on carrying up the record, will order the transcript to be amended by it^g: and though, after a writ of error, it is not usual to suffer an amendment of the record of an inferior court^h, yet where there is a mistake in the transcript, the court above will order it to be rectifiedⁱ.

On an amendment after error brought, it was not formerly usual to allow the plaintiff his costs of the writ of error^k; but it is now

^c 2 Str. 837.

^e Hardr. 505.

^d Cro. Jac. 429, 628. 2

^h 1 Rol. Abr. 209, 10.

Rol. Rep. 471.

ⁱ 1 Willf. 337. Say. Rep.

^e 1 Rol. Abr. 209.

59. S. C.

^f 11. 2 Str. 837.

^k 3 Mod. 113.

settled,

settled, that they shall be allowed him, provided the amendment be made after final judgment, and the plaintiff, after notice of the amendment, do not proceed further¹; but if the amendment be made before final judgment^m, or the plaintiff proceed after notice thereofⁿ, he shall not be allowed his costs. And where amendments are made, upon a writ of error, after verdict, &c. by virtue of the statutes of Jeofails, no costs are given; for the construction of those statutes has been, to give judgment for the party upon the writ of error, as if the amendments had been made^o.

¹ 3 Lev. 361. 2 Ld Raym. 897.

^m 3 Ld Raym. 95.

ⁿ 1 Salk. 49. *Sumarg.*

^o *Call temp. Hardw.* 314.

C H A P. XXXI.

Of making up, and entering the Issue.

AN issue is defined to be a single, certain and material point, issuing out of the allegations or pleadings of the plaintiff and defendant^a; but it more commonly signifies, the entry of the allegations or pleadings themselves: and it is either in *law*, upon a demurrer; or in *fact*, which is triable by the court, upon *nul tiel record*, or by a jury, upon pleadings concluding to the country. Two or more of these issues are sometimes joined in the same cause; as where the defendant demurs and pleads to different counts of a declaration, or the plaintiff demurs and replies to different pleas, or where, in an action against several defendants, they appear and plead by different attornies.

The issue should in all cases be made up of the term in which it is joined; and, as dependent on the pleadings, it is *general* or *special*. In every action, wherein the defendant pleads the general issue, or demurs generally to the

^a Co. Lit. 126. a.

declaration;

declaration; in *debt*, where he pleads a special *non est factum*, *comperuit ad diem* to a bail bond, or *nul tiel record* to an action on a judgment or recognizance; in *covenant*, where his plea concludes to the country; and in *trespass*, where he pleads *son assault demesne*, *liberum tenementum*, or not guilty to a new assignment; the issue is made up, on treble penny stamped paper, by the plaintiff's attorney; who likewise makes up all issues and demurrers upon writs of error, *scire facias*, and *audita querela*, and repleaders, or other matters formerly entered of record ^b.

In all other cases, both by bill and original, the issue, or, as it is commonly termed, the *paper-book*, or, upon an issue in law, the *demurrer-book*, is made up by the clerk of the papers ^c; who charges the plaintiff's attorney *eight-pence* per sheet for the whole book, and *four-pence* per sheet for all the pleadings subsequent to the declaration, (which the plaintiff's attorney furnishes him with a copy of,) besides stamps.

Formerly, when the plaintiff in his replication concluded to the country, or demurred, the issue could not have been made up, till a

^b R. T. 12 W. III. a. 2 Str. 1266.

^c Say. Rep. 97. but see

four-day rule had been given and expired, to rejoin or join in demurrer; but the practice in that respect is now altered, it being a rule, that in all special pleadings, where the plaintiff takes issue upon the defendant's pleading, or traverses, the same, or demurs, so as the defendant is not let in to alledge any new matter, the plaintiff may make up the paper-book, without giving a rule to rejoin^d: but otherwise a rule must be given for that purpose, unless the defendant be bound, by a judge's order, to rejoin *gratis*.

The issue contains an entry or transcript of the declaration, and other subsequent pleadings; and in actions by *bill*, is prefaced with a *memorandum*, stating the exhibiting of the bill, and that there are pledges for the prosecution of it. The reason for a *memorandum* is, that proceedings by bill were formerly considered as the bye business of the court^e: and it varies in four cases; first, when the issue is of the same term, in which the cause of action accrued; secondly, when it is of a term subsequent to the cause of action, but of the same term with the declaration; thirdly, when it is of a term subsequent to the declaration, and within four terms after; fourthly,

^d R. T. 1 G. II. a.^e Gilb. C. P. 47.

when

when it is more than four terms after the declaration. In the first case, the *memorandum* is special, stating the bill to have been exhibited on a particular day in term, after the cause of action accrued: In the second case, it states the bill to have been exhibited on the first day of the term, in which the declaration was delivered: In the third and fourth cases, it pursues the fact, but with this difference, that in the third case, the term of exhibiting the bill is referred to as *last* past, and in the fourth, as in a certain year of the king's reign.

The bill or declaration then follows, and afterwards, if the plea be of a term subsequent to the declaration, the issue by *bill* contains the entry of an imparlance: But in actions by *original*, the issue begins with the declaration, without a *memorandum*, and no imparlance is necessary. An imparlance, we have seen, is general or special. Where a special imparlance is necessary, to enable the defendant to plead any particular plea, it must be entered in the issue; but otherwise the entry of a general imparlance is sufficient: and it is not necessary to enter more than one imparlance, though several terms have intervened between the declaration and the plea.

When

When the replication is of a term subsequent to the plea, it is usual for the clerk of the papers to insert continuances in the paper book; but this does not seem to be necessary^f.

The *pleadings* are next copied, in their proper order, beginning each with a new line; and under them, the clerk of the papers is directed to write the names of the counsel by whom they are signed, as well on the part of the plaintiff, as of the defendant^g. Formerly, if there was a plea in abatement, upon which a *respondeas ouster* was awarded, and afterwards the defendant had pleaded in chief, it was necessary to enter the plea in abatement, and judgment of *respondeas ouster*, in making up the issue, as well as the plea in chief^h; and where they were entered in the plea-roll, but omitted in the record of *Nisi Prius*, the court on that ground arrested the judgment, the record of *Nisi Prius* not appearing to be in the same causeⁱ. Afterwards, a rule was made, that, for the future, a copy of the plea in chief only should be delivered and paid for^j; and agreeably thereto, where the

^f 5 Co. 75.

447. 5 Mod. 399. 12 Mod.

^g R. E. 18 Car. II.

119. S. C.

^h 7 Mod. 51. 1 Salk. 5.

j 7 Mod. 51. 1 Salk. 5.

ⁱ 1 Ld. Raym. 329. Carth.

plea in abatement, and judgment of *respondens* *ouster*, were omitted in the plea-roll, the court held the omission to be immaterial; particularly, as the defendant had accepted and paid for the issue^k.

On an issue in *law*, the demurrer-book concludes thus: "*But because the court of our lord the king now here is not yet advised, what judgment to give of and upon the premisses, a day is given to the parties aforesaid, before our said lord the king at Westminster, or (by original) wheresoever, &c. on (the day appointed for argument,) to hear judgment thereon, for that the court of our said lord the king now here is not yet advised thereof, &c.*" which is called a continuance by *curia advisari vult*. An issue in *fact*, triable by the record, concludes by giving the party averring, a day to produce it; or if triable by the country, it is concluded with the award of the *venire facias*, or process to bring in the jury, as follows: "*Therefore let a jury thereupon come before our lord the king at Westminster, or (by original) wheresoever, &c. on (the return of the writ,) twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as*

^k 3 Bur. 1682.

" well,

“well, &c.¹. The same day is given to the
“parties aforesaid at the same place.”

It was settled in Sir Peter Delme's case ^m, and has ever since been the practice of the court, that if either party would suggest any special matter, about awarding the *venire* out of the common course, he should give a copy of it to the adverse party, and allow him a reasonable time to consider it, before a *nient dedire* is entered ⁿ. When a fair and impartial, or at least a satisfactory trial cannot be had, in the county where the action is laid, the court must be moved, on an affidavit of the circumstances, for leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in an adjoining county: And as the suggestion in such case is not traversable, the court will see that it is necessary, before they give leave to enter it ^o. Where there are several plaintiffs or defendants in a personal action, and one of them dies before issue joined, his death should be suggested, in making up the issue; but other-

¹ For the explanation of nature and effect of a *nient dedire*, see 1 Str. 183.

venire facias, post, chap. 35.

^m 10 Mod. 198.

ⁿ 1 Str. 235. and for the

^o 3 Bur. 1333. By Ld. Mansfield and the court, E.

20 Geo. III.

wife it need not be suggested, till the plea-roll is made up^p.

The *general issue* being made up, is delivered to the defendant's attorney or agent, who is charged for the same, at the rate of *four-pence* per sheet copy-ways, and also for the stamps : And if he do not pay the issue money, within **24** hours after the issue is delivered^q, the plaintiff's attorney may sign judgment, as if there had been no plea or demurrer^r. If there are several defendants, who appear by different attorneys, a copy of the issue should be delivered to each of them.

The *paper-book* being made up, is also delivered to the defendant's attorney, with a conditional rule in the margin, given by the clerk of the papers, intimating, that unless the defendant receive the paper-book, and return it, by a particular day, to be inrolled, a writ of inquiry will issue, or rule for judgment be entered. If a paper-book be made up and delivered in term time, or within *four* days exclusive after term, with a rule given thereon, by the

^p 1 Bur. 363.

^r R. T. 12 W. III. 7

^q Say. Rep. 19. *Wenham* Mod. 51.

v. *Tristram*, H. 21 Geo. III.

clerk

clerk of the papers, for bringing the same to be inrolled, and the defendant's attorney doth not, within *four* days after the delivery thereof, bring it back, and join with the plaintiff in the special issue or demurrer, or waive his special plea and give the general issue, or demurrer to any special issue tendered, and pay for entering the pleadings on his part, judgment may be entered and signed, as if no plea had been pleaded. But where a plea is not put in in time, so that a paper-book may be made up and delivered in term, or within four days after, yet if it be made up and delivered within *eight* days after the term, the defendant's attorney is obliged to take it, and return it again in *four* days after the delivery, or judgment may be signed^o.

If a plea be pleaded in term, or in time after term, and the paper-book is not made up and delivered within *eight* days exclusive after term, if it be an issue to be tried in *London* or *Middlesex*, or a demurrer, the other party is not bound to deliver back the book, till within the first *four* days of the next term; but if it be an issue to be tried at the *assizes*, the defendant's attorney should deliver back the book within *four* days, after the de-

^o R. T. 1 Geo. II. (a).

livery thereof, and pay for entering his part, and join in the special issue, or give the general issue, and take notice of trial; or else the plaintiff's attorney may sign judgment by default, as if the defendant had not pleaded^t. And the plaintiff does not waive his right of signing judgment, for not paying the issue money, by giving notice of trial, after demanding it^u. If the paper-book be of an issue in *fact*, the four days for keeping it are reckoned *exclusive*; if of a demurrer or issue in *law*, they are *inclusive*^v. And when a paper-book is not returned within the four days, the plaintiff's attorney may afterwards refuse to accept it, and sign judgment^w; but judgment cannot be signed after the paper-book is accepted, though it be not returned in due time.

Within the time limited for that purpose, the defendant's attorney or agent either returns the paper-book, or not; and if returned, he either returns it, in the state it was delivered to him; or, if he has not been ruled to abide by his plea, he may waive the special pleadings, and give the general issue; or, if the *similiter*

^t R. T. 1 Geo. II. (a).

^w Doug. 197. 4 T. R.

^u 5 T. R. 400

195. but see Doug. 67. 1

^v R. T. 1 Geo. II. (a).

T. R. 16. *semb. contra.*

but see Imp. K. B. 294.

to the replication has been added by the plaintiff, he may strike it out and demur. In the latter case, the plaintiff having joined in demurrer, a demurrer-book is made up by the clerk of the papers, and delivered over to the defendant's attorney; who must return it in twenty-four hours, unless the demurrer be special, and the defendant has not been ruled to abide by his plea, in which case he may still waive his special plea and demurrer, and give the general issue.

On returning the paper-book, if returned as delivered, or otherwise on returning the demurrer-book, the defendant's attorney or agent must in general pay *eight-pence* per sheet for his own pleadings, and *four-pence* per sheet for those of the plaintiff, unless previously paid for; and in a *qui tam* action, he pays double. If the paper-book be returned with the general issue, the special pleadings are not paid for; but the plaintiff's attorney makes up and delivers the issue afresh, in the common form. A plaintiff, suing in *forma pauperis*, is not entitled to the issue money^{*}; and an attorney, or prisoner, is excused from the payment of it[†]. In a *qui tam* action, if the court see reason to suspect, that it is pro-

^{*} 5 T. R. 509.

[†] Say. Rep 77.

secuted merely for the issue money, they will permit it to be paid into court, on motion, to abide the event of the suit^z. Formerly, it seems, the defendant's attorney or agent must have paid for the issue or paper-book, whatever was demanded for it^a; but it is now deemed sufficient, if he be ready to pay and tender what is really due.

By accepting and paying for the issue, or returning the paper-book, the defendant's attorney admits it to be properly made up^b: And therefore if there be any variance therein from the pleadings delivered, or other irregularity in making it up, the defendant's attorney or agent, instead of accepting and paying for it, should take out a judge's summons, and obtain an order for setting it right, as he cannot otherwise take advantage of the irregularity, on a motion in arrest of judgment, or for a new trial.

When the issue is accepted and paid for, or the paper-book returned, the plaintiff should enter it on record, and proceed to argument, if an issue in law, or to trial, if an issue in fact. And if he neglect to do so, the defendant may

^z 3 T. R. 137.

^b 2 Str. 1131, 1266. Say.

^a Barnes, 263, 275. 2 Rep. 154. 3 Bur. 1682.

Blac. Rep. 1093.

compel him, by obtaining a rule from the master, on the back of the issue, entering it with the clerk of the rules, and serving a copy on the plaintiff's attorney^c. But the defendant cannot give a rule to reply, and enter the issue, in the same term: and if the action be laid in *London* or *Middlesex*, the defendant ought not to give a rule for the plaintiff to enter his issue, the same term it is joined, unless notice of trial has been given: and in a *country* cause, the plaintiff is no ways bound to enter his issue, the same term^d.

The plaintiff being ruled to enter the issue, must enter it, if in *London* or *Middlesex*, and bring the record into the office, within *four* days after notice of the rule: if in the country, before the *continuance*-day of that term: otherwise, a *non pros* may be signed, and the defendant shall have his costs^e. But a judgment of *non pros* cannot be regularly signed, after the issue is entered, though it be not entered within the time allowed by the rule^f.

In order to enter the issue, a *roll* must be obtained, of the term it is joined, which is called the *issue-roll*. This roll, begins with an

^c Imp. K. B. 306.

M. 4 Ann. (c).

^d R. M. 4 Ann. (c).

^e 1 T. R. 16. but see 4 T.

^f 2 Lil. P. R. 87. R. R. 195. *semb. contra*.

entry of the *warrants* of attorney for the plaintiff and defendant, which was introduced by *Wright*, Chief Justice, in the reign of *James the Second*^g, previous to which time the warrants of attorney were entered on a separate roll^h. The declaration, and subsequent pleadings, are then entered, as in the issue or paper-book; and the entry of them should be made in a full fair hand, with a margin of an inch at least, and a convenient distance at the top, for binding up the same; and at the bottom, that the writing be not rubbed outⁱ. The issue being thus entered on the roll, a *number* should be got for it, from the clerk of the judgments, if it be an issue of the same term, or otherwise from the clerk of the treasury; and the roll being numbered, is carried to, and *docketed* with, the clerk of the judgments, who takes for the entries, after which it is *filed* in the treasury of the court.

In practice, it is not usual to enter the issue at full length, if triable by the country, until after the trial, unless the plaintiff be ruled to enter it; but only to make an *incipitur* on the roll, at the time of passing the record of *Nisi Prius*.

^g R. E. 4 Jac. II.

ⁱ Salk. 88.

^h 1 Ld. Raym. 509. 2 Ld.

ⁱ R. H. 1657.

Raym. 895. Carth. 517.

This however is necessary; it being declared, by rule of court^k, that no record of *Nisi Prius* shall be sealed, or passed at the *Nisi Prius* office, before the issue is fairly entered on record, or an *incipitur* thereof; and such entry, with the record of *Nisi Prius*, first brought to be signed by the secondary.

Hitherto we have spoken only of issues, made up and entered by the *plaintiff*: but in actions of *replevin*, *prohibition*, and *quare impedit*, wherein the defendant is considered as an actor, the issue may be made up and entered by the *defendant*, as well as the plaintiff. And there is a rule of court^l, that if the plaintiff *demur* in law to the defendant's plea, rejoinder, or rebutter, and the defendant join in demurrer, the plaintiff's attorney shall enter the demurrer of record; and in default thereof, upon a rule given by the secondary, it may be entered of record by the defendant's attorney. Accordingly, if the plaintiff demur, or take issue on the defendant's plea, rejoinder, or rebutter, and the defendant, in case of a demurrer, join therein, and the plaintiff will not make up the book, and enter it on record, the defendant may, pursuant to this rule, make up the book, and

^k R. M. 5 Ann. reg. 1. ^l R. E. 11 W. III.

enter it; and when he has made up the book, he must deliver it to the plaintiff, and pay him for the entry of his own pleadings; because the plaintiff may perhaps enter the issue, as he has a right to do, at any time before the expiration of the rule given by the secondary; which rule ought to be served on the plaintiff, at the same time the book is delivered to him. If the plaintiff do not enter the issue, the defendant may, at the expiration of the rule, and give notice of trial by *proviso*; but then the plaintiff ought to return to the defendant, the money he received from him, for the entry on his part^m.

^m R. E. 11 W. III. (a).

C H A P. XXXII.

Of arguing the Demurrer.

WHEN the issue in law, upon a demurrer, has been entered on record, by the plaintiff, or in his default by the defendant, either party may move the court for a *concilium*, and proceed to argument^a.

Where there are several issues, in law and in fact, there has been great diversity of opinion, as to which of them should be first tried or determined. According to the earlier authorities, if a man demur to part, and take issue on other part, or if the declaration be against two defendants, and one demur, and the other take issue, the court shall determine which they please first^b; though it was reckoned the more orderly way to give judgment first on the demurrer^c. In another book it is said, that the issue in fact ought to be first tried; because if this be found for the plain-

^a R. T. 1 Geo. II. (a). C. P. 57.

^b Co. Lit. 72. a. Gilb. ^c Co. Lit. 72. a.

tiff,

tiff, the jury who try it may assess conditional damages, as to the demurrer^d. But according to the later cases, where there are several issues, in law and in fact, the determination of the issue in law may be either before or after the trial of the other, at the election of the plaintiff^e. In practice, it is usual and adviseable to determine the issue in law first, for the following reasons; first, that the determination of an issue in law is generally more expeditious, and less expensive, than the trial of an issue in fact: secondly, that if the issue in law go to the whole cause of action, and be determined against the plaintiff, it is conclusive, and there is no occasion afterwards to try the issue in fact; whereas, if the issue in fact be first tried, and found for the plaintiff, he must still proceed to the determination of the issue in law, and if that be found against him, he will not be allowed his costs of the trial of the issue in fact: and lastly, that whether the demurrer goes to the whole or part of the cause of action, if the plaintiff proceed to argue it first, and the court are of opinion against him, he may

^d Say. *Dam.* 115. cites
Lutw. 875.

^e 2 Lil. P. R. 85. R. E.
23 Car. I. B. R.

amend

amend as at common law; but after the cause has been carried down to trial, he cannot amend any farther than is allowable by the statutes of amendments.

The *concilium*, *dies concilii*, or day to hear the counsel of both parties^f, was formerly moved for, upon reading the record in court^g; but now it is a motion of course, which only requires a counsel's signature: still however the record is taken to the clerk of the papers, who marks it *read*, and signs the initials of his name on the brief or motion paper; which being carried to the clerk of the rules, he draws up the rule thereon, and then the cause is entered for argument with the clerk of the papers^h. It is not necessary, though usual, for the plaintiff to serve the rule for the *concilium* upon a demurrer, or to give notice of putting it in the paper; it being in strictness the defendant's duty to searchⁱ. Signing a *concilium* is considered as a step in the cause, so as to make it unnecessary to give a term's notice^j.

^f R. E. 2 Jac. II.

ⁱ 2 Str. 1242.

^g 2 Lil. P. R. 421.

^j 3 T. R. 530.

^h R. T. 1 Geo. II. a.

478 Of arguing the Demurrer.

Two days previous to the day appointed for argument^k, copies of the demurrer books should be delivered by the plaintiff or his attorney, on unstamped paper, to the chief justice and *senior* judge, and by the defendant or his attorney, to the two other judges^l, in which should be inserted the names of the counsel who signed the pleadings^m; and the exceptions intended to be insisted upon in argument, should be marked in the marginⁿ. If either party neglect to deliver the books, they ought to be delivered by the other; and the party neglecting shall not be heard, until he have paid for them^o.

The judgment for the plaintiff, on demurrer to a plea or replication in abatement, is not final, but only a *respondeas ouster*^p: In other cases, it is interlocutory or final, according to the nature of the action: if the action be for damages, in *assumpsit*, &c. it is interlocutory, and should be signed, on treble-penny stamped paper, with the clerk of the judgments, after which the damages should

^k R. E. 2 Jac. H. (a).

^o R. M. 17 Car. I.

^l R. M. 17 Car. I.

^p Gilb. C. P. 53. 1 Ld.

^m R. E. 18 Car. II.

Raym. 351. Say. Rep. 46.

ⁿ R. E. 2 Jac. II.

² Willf. 367.

be

be assessed, on a writ of inquiry, or reference to the master; but in *debt*, &c. for a sum certain, the judgment is final, and there being no necessity for a rule for judgment^a, the plaintiff may immediately tax his costs, and take out execution.

^a 1 Str. 425.

C H A P. XXXIII.

Of the Issue, and Trial by the Record.

THE issue, we are now treating of, arises upon a plea or replication of *nul tiel record*. The plea of *nul tiel record* is always concluded with an averment, and prayer of judgment *si actio*, &c.^a; and if it state a record of the *same* court, the replication thereto may conclude with a prayer *that it be viewed, and inspected by the court*^b: but where the record is of *another* court, the defendant shall have a day given him to bring it in^c.

Where a judgment, or other matter of record, in the *same* court is pleaded, and the plaintiff replies *nul tiel record*, the replication may conclude as follows, "*and this he is ready to verify, &c. and because the court of our lord the king now here will advise themselves, upon inspection and examination of the record, by the said (defendant) above alledged, a day is given to the par-*

^a 2 Will. 114.^c 2 Salk. 566. 3 Blac.^b Herne, 278. 2 Lutw. Com. 330, 1.

1514. Barnes, 336.

"*ties aforesaid, before our said lord the king at Westminster, until, &c.*"^d or, instead of replying, the plaintiff may crave *oyer* of the record, or at least a note in writing of the term and number-roll, and if it be not given him in convenient time, he may sign judgment. This practice was originally confined to pleas in abatement^e, but was afterwards extended to pleas in bar^f; and accordingly it is now settled, that wherever a judgment or matter of record in the *same* court is pleaded, the party pleading it must, on demand, give a note in writing of the term and number-roll, whereon such judgment or matter of record is entered and filed, or in default thereof, the plea is not to be received^g. Where the record is of *another* court, the plaintiff may either conclude his replication of *nul tiel record*, by^h giving the defendant a day to bring it in, or with an averment and prayer of the debt and damages^h: in the former case, the issue is compleat upon the re-

^d Dyer, 227, 8. 2 Lutw. 347. 550. 2 Ld. Raym. 1514. 2 Salk. 566. Carth. 1179.

517. 1 Ld. Raym. 550. ^f 2 Str. 823.

S. C. ^g R. T. 5 & 6 Geo. II.

^e Keilw. 95, 6. Carth. b. *ante*, 345, 6.

453. 517. 1 Ld. Raym. ^h Barnes, 161. 2 Wils.

plicationⁱ; but in the latter, there ought to be a rejoinder, that there is such a record^k, &c.

This issue is triable by the record itself, if it be of the same court; or if it be of another court, then by an exemplification under the Great Seal^l. Where the record is of the *same* court, and the plaintiff avers its existence, *notice* is given to the defendant's attorney, that he will produce it on a particular day; being a general return day, or day certain, according to the nature of the proceedings: and, if he be not then ready, it seems that he may *continue* the day for bringing in the record^m. But where the existence of the record is averred by the defendant, the plaintiff's attorney gives him a four-day *rule* to produce it, which he obtains from the master, on the paper-book; and having entered it with the clerk of the rules, serves a copy on the defendant's attorney.

On the day appointed for producing the record, the issue, being previously entered, is brought into court, and proclamation being

ⁱ Cas. Pr. C. P. 56. Pr. ^l Bul. Ni. Pri. 230. Gilb. Reg. 227, 8. Barnes, 161, Evid. 26. 2 Bur. 1034.

335, 6. Com. Rep. 533.

^m Barnes, 85.

^k 1 Ld. Raym. 550.

made by the Cryer, for producing the record, it is, or is not produced. If produced, the party producing it is entitled to judgment, that he hath *perfected* the record; but otherwise judgment is given for the adverse party, that he hath *failed* in producing it. If the defendant plead in abatement, another action depending for the same cause, and the plaintiff afterwards discontinues, the issue on *nul tiel record* must be found against him, because the plea was true at the time of pleading it; but if a recovery be pleaded in bar, and the judgment is afterwards reversed, before the day given to bring in the record, there, upon *nul tiel record*, the issue must be found for the plaintiff, because by the reversal the record is avoided *ab initio*ⁿ.

The mode of obtaining an exemplification, of the record of *another* court, is by *certiorari* and *mittimus*. The *certiorari* is an original writ, issuing sometimes out of Chancery, and sometimes out of the King's Bench, and lieth where the king would be certified of any record which is in the treasury, or in the Common Pleas, or in any court of record, or before the sheriff and coroners, or of a

ⁿ 1 Ld. Raym. 274. 2 329. S. C.
Ld. Raym. 1014. 1 Salk.

record before commissioners, or before the escheator; in these cases, the king may send that writ to any of the said courts or officers, to certify such record before him *in banco*, or in Chancery, or before other justices, where the king pleaseth to have the same certified. And the courts or officers, to whom the *certiorari* is directed, ought to send the same record, according to the tenor of the writ, and as the writ doth command them; and if they fail so to do, then an *alias* shall be awarded, and afterwards a *pluries*, with a clause of *vel causam nobis significes*, and after that an attachment, if a good cause be not returned upon the *pluries*, wherefore they do not send the writ^o.

On this writ, where the superior court doth not send for the record of an inferior one, to see whether they keep within the limits of their jurisdiction, but merely, on *nul tiel record*, to know whether there be such a record or not, it is sufficient to certify the *tenor* of the record^p; and in Chancery they never certify any thing more, for that court does not send for the record of the inferior one, to bound their jurisdiction, but to send it to other courts by *mittimus*^q.

^o Gilb. Exec. 175, 6. and
see Palm., 562.

^p Gilb. Exec. 143.
^q *Id.* 145.

If a recovery in an inferior court be pleaded, or declared on, in a superior one, and denied, the *certiorari* may in general issue either out of the superior court, or the Chancery: if it issue out of the former, the record itself must be certified; if out of the latter, only the tenor^r. But if such recovery be pleaded or declared on, and denied, under the seal of the inferior court, the *certiorari* must issue out of Chancery^s. And so where *nul tiel record* is pleaded, to the record of a superior court, or court of concurrent jurisdiction, there is no way to have it, but by *certiorari* and *mittimus* out of Chancery^t; for one court is not bounded by the other, in point of jurisdiction, and in their judicial capacities they cannot command each other: but the Chancery, which is the center of all the courts, may, by its original constitution, send for the records of any of them, and from thence the subjects may receive copies, or exemplifications under the Great Seal^u.

On a plea in abatement, the judgment for the plaintiff, on an issue of *nul tiel record*, is

^r 3 Salk. 296.

^u Gilb. Exec. 145. 153.

^s Gilb. Exec. 148, 9. 170. 169. and see Gilb. Exec.

^t 2 Bur. 1034. and see 15.

Cro. Car. 297.

not final, but only a *respondeas ouster*; for failure of record in this case is not peremptory ^v. In other cases, the judgment is interlocutory or final, as upon demurrer; and if it be final, a rule for judgment must be given, which expires in four days exclusive, but otherwise the rule for judgment is not given till the return of the inquiry ^w.

^v Carth. 517. 1 Ld. Raym.
550.

^w Imp. K. B. 290. Barnes,
264.

C H A P. XXXIV.

**Of Proceedings upon an Issue, triable
by the Country.**

PREVIOUS to the sittings or assizes, at which the cause is intended to be tried, the plaintiff should give due notice of trial; and if he proceed to trial, without giving such notice, the verdict may be set aside for irregularity. Every notice of trial ought to be in writing^a; and given to the defendant, if he appear in person, or otherwise to his attorney or agent in town, if his place of abode be known^b; but if it be unknown, the notice may be given to the defendant himself; and where the defendant is a prisoner, notice of trial may be given to the turnkey^c.

Upon the delivery of a paper-book, wherein issue is joined, and notice of trial given, (as it may be), on the back of the book, if the special pleadings be afterwards waived, and the general issue given, the notice, which was

^a R. M. 4 Ann. (c).

^c 1 Str. 248.

^b Say. Rep. 133.

given

given for the trial of the special issue, shall serve for notice of trial, upon the general issue^d. And so where the plaintiff, upon any pleading of the defendant, tenders an issue, and the paper-book is made up, and delivered with notice of trial, and the defendant strikes out the *similiter*, and returns the book with a demurrer, if judgment be given thereon for the plaintiff, the same notice, that was given for the trial of the issue, shall serve for executing the writ of inquiry^e: but then, the plaintiff ought to give notice of the hour and place of executing it^f.

Notice of trial may be, and is usually, given on the back of the issue or paper-book; or it may be given on a separate paper. In the former case, it need not be so particular as in the latter: and therefore, where the issue was indorsed as follows, "Take notice of trial at the next assizes," this was held to be a sufficient notice, without any mention of the date, county, or attorney's name; though it would have been otherwise, if given on a separate paper^g.

If the venue be laid in *London* or *Middlesex*, and the defendant live within forty com-

^d R. H. 8 Geo. I. (a).

^e *Idem* (a).

^f Same rule.

^g 2 Str. 1237.

puted

puted^h miles of *London*, there must be *eight* days notice of trial, exclusive of the day it is given, but inclusive of that on which the trial is to be had; and if the defendant live above forty computed miles from *London*, then *fourteen* days notice must be givenⁱ. In country causes, eight days notice of trial seems to have been formerly sufficient; but now, by statute 14 *Geo. II. c. 17. § 4.* "Where the defendant resides above forty miles from town, no cause shall be tried at *Nisi Prius*, either at the assizes or sittings in *London* or *Westminster*, unless notice of trial in writing has been given, at least *ten* days before such intended trial:" and hence *ten* days notice of trial is required, in all cases, at the *assizes*. But as this statute has no negative words, it is still necessary to give *fourteen* days notice of trial, for the sittings in *London* or *Westminster*, where the defendant lives above forty computed miles from *London*. The venue was laid in *London*, and the defendant residing in *India*, a verdict for the plaintiff was set aside, because only *eight* days notice of trial had been given^k.

^h 2 Str. 954, 1216.

^k 4 T. R. 552.

ⁱ R. M. 4 Ann. (c).

Upon

Upon an *old* issue, or, in other words, where there have been no proceedings for four terms exclusive after issue joined, a term's notice is requisite¹; which notice must be given before the *essoign* day of the fifth, or other subsequent term^m: and a judge's summons, if no order has been made upon it, is not a proceeding within the meaning of this rule, but a notice of trial, though countermanded, isⁿ. The rule requiring a term's notice does not extend to a motion for judgment as in case of a nonsuit^o; and being confined to *voluntary* delays, it does not apply, where the cause has been stayed by *injunction* or *privilege*^p, or where there has been an *agreement* to stay proceedings for a limited time, to enable the defendant to pay the debt, in default of which the plaintiff is to be at liberty to proceed^q. *Short* notice of trial, in country causes, must be given *four* days at least before the commission day, one exclusive and the other inclusive^r: In town causes, *two* days notice seems to be sufficient^s; but it

¹ R. M. 4 Ann. (c).^q 2 Bur. 660. 2 Blac. Rep.^m 1 Str. 211. 2 Str. 1164. 762, 784.ⁿ 1 Str. 531.^r R. E. 30 Geo. III. 3^o 5 T. R. 634.

T. R. 660.

^p 1 Sid. 92. R. M. 4^s Fr. Reg. 390.

Ann. (c). Doug. 71.

is usual to give as much more, as the time will admit of. And *Sunday* is to be accounted a day in these notices, unless it be the day on which the notice is given^t.

If the plaintiff be not ready to proceed to trial, pursuant to notice, he may *countermand* or in some cases *continue* it. Notice of countermand, like notice of trial, ought to be in writing^u; and may be given to the attorney in the country, as well as the agent in town^v. Before the statute 14 Geo. II. c. 17. *two* days notice of countermand appears to have been sufficient in all cases, unless it was for a trial at the assizes, and the countermand was given to the agent in town; in which case it was required to be given, *four* days before the commission day^w. But now, by that statute, § 5. the countermand of notice of trial at the assizes, or in a town cause where the defendant lives above forty miles from *London*, must be given *six* days at least before the intended trial: in other cases, *two* days notice of countermand is still sufficient, the day of countermand being one, exclusive of the commission day, or day of sittings.

^t R. M. 4 Ann. (c).

^u *Id. ibid.*

^v 2 Str. 1073.

^w R. M. 4 Ann. (c). 2

Str. 849, 1073.

If the plaintiff give notice of trial, and proceed not accordingly, he cannot in general take the cause down to trial again, without new notice, to be given as before, unless by consent or rule of court ^x. But if notice of trial be given for a day certain in *London* or *Middlesex*, and the plaintiff be not ready to proceed, the cause may be tried at the next sitting, upon notice given before the rising of the court during the first ^y; which is called a notice of trial by *continuance*: So, if the defendant enter a *ne recipiatur*, and by that means hinder the plaintiff from trying his cause at one sitting, the plaintiff, upon the like notice, may proceed to trial at the next ^z. But the plaintiff cannot continue his notice of trial, more than once in a term ^a. And in either of the before-mentioned cases, if the cause be not tried at such next sitting, notice is to be given as at first, unless it be made a *remanet*, and then new notice of trial is never given, for the defendant is bound to attend till the cause be tried ^b.

If the plaintiff do not proceed to trial pursuant to notice, or countermand in time, the

^x R. M. 1654. § 18.

^a 2 Str. 1119.

^y R. M. 4 Ann. (c).

^b R. M. 4 Ann. (c).

^z Same rule.

defendant,

defendant, on an affidavit of attendance and necessary expences, shall be allowed his costs of the day^c; or, after the issue is entered, he may move the court for a trial by *proviso*, as at common law, or for judgment as in case of a nonsuit, upon the statute 14 Geo. II. c. 17. But the defendant cannot move for judgment as in case of a non-suit, and costs for not proceeding to trial, at the same time^d; and when he has elected the one, he cannot afterwards have the other^e. In practice, it is usual for the defendant to move for judgment as in case of a nonsuit; and then, if the court, on shewing cause against the rule, grant further time to the plaintiff, it is always on the condition of his paying costs for not proceeding to trial.

The trial by *proviso* is so called, from a clause in the *distringas*, which provides, that if two writs come to the sheriff, he shall only execute and return one of them^f. And if both the plaintiff and defendant happen to carry down the record, at the same time, the trial shall be by the plaintiff's record, if he enter it with the marshal; but if he do not

^c R. M. 1654. § 18. R. M. 4 Ann. (c).

^e Barnes, 316. 2 Blac. Rep. 1110.

^d *Earl of Leicester v. Wood-*
en, M. 21 Geo. II.

^f 2 Lil. P. R. 612, 617.

enter it, the defendant may proceed on *his* record^g. This trial cannot be had, till there has been some laches or default in the plaintiff, in not proceeding to trial, after issue joined, nor until after the issue is entered on record; except in cases where the defendant is considered as an actor as in *replevin*, *prohibition*, and *quare impedit*, which are to have a return, consultation, and writ to the bishop^h. Of course, the defendant, before he can have a trial by *proviso*, must give the plaintiff a rule to enter the issue; and if it be not entered, he may sign a *nonpros*ⁱ. If it be, and the plaintiff has been guilty of laches, the defendant should give a *rule* in the office for a trial by *proviso*^k; which he may do, after he has given notice of trial^l. Of a trial by *proviso*, the defendant must give the like *notice* to the plaintiff, as the plaintiff would have been obliged to give to him^m: and if he do not proceed to trial according to notice, or countermand in time, the plaintiff shall have his costsⁿ.

^g R. M. 4 Ann. (c).

^k 2 Str. 1055.

^h 2 Salk. 652. R. M. 4

^l 1 T. R. 695.

Ann. (a).

^m R. M. 1651.

ⁱ 2 Lil. P. R. 84, 87, 612, 615, 617.

ⁿ R. M. 4 Ann. (c). 2 Str. 797.

The delay and expence attending the trial by *proviso*, gave rise to the statute 14 Geo. II. c. 17. by which it is enacted, " That where
 " any issue is or shall be joined, in any action
 " or suit at law, in any of his Majesty's courts
 " of record at *Westminster*, &c. and the plain-
 " tiff or plaintiffs in any such action or suit
 " hath or have neglected, or shall neglect, to
 " bring such issue on to be tried, *according to*
 " *the course and practice of the said courts re-*
 " *spectively*, it shall and may be lawful for the
 " judge or judges of the said courts respective-
 " ly, at any time after such neglect, upon
 " motion made in open court, (due notice
 " having been given thereof,) to give the like
 " judgment for the defendant or defendants in
 " every such action or suit, as in cases of non-
 " suit; unless the said judge or judges shall,
 " upon just cause, and reasonable terms, al-
 " low any further time for the trial of such
 " issue: and if the plaintiff or plaintiffs shall
 " neglect to try such issue, within the time so
 " allowed, then and in every such case the
 " said judge or judges shall proceed to give
 " such judgment as aforesaid. Provided al-
 " ways, That all judgments, given by virtue
 " of this act, shall be of the like force and
 " effect as judgments upon nonsuit, and of no

“ other force or effect. Provided also, That
 “ the defendant or defendants shall, upon
 “ such judgment, be awarded his, her or their
 “ costs, in any action or suit, where he, she or
 “ they would upon nonsuit be intitled to the
 “ same, and in no other action or suit what-
 “ soever.”

This statute has been held to extend to *qui tam* actions^o, as well as others; and also to the traverse of the return of a *mandamus*^p; but it does not extend, any more than the trial by *proviso*, to actions of *replevin*^q, &c. in which the defendant is considered as an actor, and may therefore enter the issue, and carry down the cause to trial himself. And where there are two defendants, one of whom lets judgment go by default, the other cannot have judgment as in case of a nonsuit^r. Also, where the cause has been once carried down to trial, the defendant cannot have such judgment, for not carrying it down again^s.

^o Barnes, 315.

^r Say. Rep. 22. Say.

^p Say. Rep. 110. Say. Costs, 163. 1 Willf. 325.
 Costs, 166. S. C. 4 T. R. S. C. Say. Rep. 103. Say.
 689. Costs, 164. S. C. 1 Bur.

^q 1 Blac. Rep. 375. Say. 358. Say. Costs, 168. S. C.
 Costs, 168. S. C. 3 T. R. 1 T. R. 492. 3 T. R.
 661. 5 T. R. 400. but see 1. H. Blac. 1 V. 101.
 Barnes, 317.

The *course* and *practice* of the court, referred to by the statute, is that which before regulated the trial by *proviso*; and as the defendant could not have had such trial, until the plaintiff had been guilty of laches, nor until after the issue was entered on record, so neither till then, is he intitled to judgment as in case of a nonsuit. We have seen^t, that if the action be laid in *London* or *Middlesex*, the defendant ought not to give a rule for the plaintiff to enter his issue, the same term in which it is joined, unless notice of trial hath been given. And accordingly it is held, that in a *town* cause, unless notice of trial has been given, the defendant cannot move for judgment as in case of a nonsuit, the next term after that in which issue was joined, although it was joined early enough, to enable the plaintiff to give notice of trial for the sittings after that term^u; the plaintiff, in such case, having the whole of the next term to enter the issue, and no laches can be imputed to him till the term after. But if notice of trial has been given, in a *town* cause, for a sitting in term, the plaintiff may move for judgment as in case of a nonsuit the next term, being

^t *Ante*, 471.

^u V. 65. *contra*. and see H.

^v 4 T. R. 557. H. Blac. Blac. 1 V. 123, 282.

the term after that in which the issue ought to be entered. To support a rule for judgment as in case of a nonsuit, in the next term after that in which issue was joined, the affidavit must state that notice of trial was given for a sitting in the preceding term; but in the third or other subsequent term, a general affidavit, stating the term when the issue was joined, is deemed sufficient^v. In a *country* cause, where notice of trial is given for the assizes, the defendant may move for judgment as in case of a nonsuit the next term: but the plaintiff is not bound to give notice of trial, till the term succeeding that in which issue was joined^w; and if he do not, the plaintiff cannot move for judgment as in case of a nonsuit, till after the next assizes.

The rule for judgment as in case of a nonsuit is a rule to shew cause, founded on an affidavit of the state of the proceedings, and of the plaintiff's default in not proceeding to trial; which rule has been held to be sufficient *notice* of motion within the act^x: and the roll must be in court, at the time the motion is made. This rule is made absolute of course, on an affidavit of service, unless the

^v H. Blac. 1 V. 282.

^w 2 T. R. 734.

^x Lofft, 265. H. Blac. 1 V. 527. *contra*.

plaintiff

plaintiff shew some cause to the contrary, as the absence of a material witness, &c. but a slight cause is in general deemed sufficient, if the plaintiff will undertake *peremptorily* to try at the next sittings or assizes. The insolvency of the defendant, after the action brought, is good cause against judgment as in case of a nonsuit^y; but unless the plaintiff will consent to stay all further proceedings, and to enter a *cesset processus*, the court will bind him down to a peremptory undertaking. Where the rule to shew cause was discharged, on an affidavit which contained an answer false in itself, the court would not afterwards open the matter, on an affidavit which disproved the contents of the former one^z.

If the rule be made absolute, the defendant having drawn it up, with the clerk of the rules, and got it stamped with a double half-crown stamp^a, may sign judgment as in case of a nonsuit, and tax his costs, &c. But if further time be given, on a peremptory undertaking, the plaintiff must draw up the rule, and serve a copy of it on the defendant's attorney; after which, if he do not proceed to trial, pursuant to his undertaking, the defend-

^y Doug. 671.

^a Imp. K. B. 321.

^z 3 T. R. 405.

ant, having obtained an office-copy of the rule, should move the court for judgment. And a mistake in the declaration is not a good excuse for not proceeding to trial, pursuant to an undertaking^b.

The statute only gives costs to the defendant, where he would have been intitled to them, upon a nonsuit: and therefore the tenant is not intitled to costs, in a writ of right^c; nor are they allowed as against an executor, who merely sues *en auter droit*^d.

If the defendant is unable to proceed to trial, on account of the absence of a material witness, he may move the court, on an affidavit of the facts, to put it off till the next term. The application for this purpose should be made *two* days at least before the day of trial^e; and it is usual, though not necessary, to give previous notice of the intended motion. The affidavit should regularly be made, by the defendant himself; and in general states, that the person absent is a material witness, without whose testimony the defend-

^b Say. Rep. 74. Say. Costs, 166. S. C.

^d 4 Bur. 1928. Barnes, 130.

^c 2 Binc. Rep. 1093.

^e Imp. K. B. 313.

ant cannot safely proceed to trial; that he has endeavoured, without effect, to get him *sub-pœna'd*, but that he is in hopes of procuring his future attendance. An affidavit in the common form is sufficient, where no cause of suspicion appears: but if there be any cause of suspicion, the court should be satisfied from circumstances, first, that the person absent is a material witness; secondly, that the party applying has not been guilty of any laches or neglect; and thirdly, that he is in reasonable expectation of being able to procure his attendance, at some future time^f. There are other causes for putting off the trial; such as the illness of the defendant's attorney^g, or on account of a paper published with intent to influence the jury^h, &c. And when any of these occur, the affidavit should be framed accordingly.

^f 3 Bur. 1514. and fee ^h 1 Bur. 512. 4 T. R.
^g 1 Blac. Rep. 436. 285.
^{*} Say. Rep. 63.

C H A P. XXXV.

Of the Jury.

HAVING, in the preceding chapter, shewn what is to be done, where the parties are not ready, or willing to proceed to trial; I shall next consider, when they are, the preparatory steps to be taken, with regard to the *jury*, *witnesses*, and *record of nisi prius*.

The first process, for convening the jury, is a *venire facias*, which is a judicial writ, commanding the sheriff, or other officer to whom it is directed, to *cause to come* before the king at *Westminster*, or (by *original*) wheresoever, &c. on a certain day therein mentioned, twelve free and lawful men of the body of the county ^a, each of whom has *ten* pounds a year of lands, tenements, or rents, at the

^a Stat. 4 & 5 Ann. c. 16. § 6. and see the 24 Geo. II. c. 18.

least,

least^b, by whom the truth of the matter may be the better known, and who are in no wise of kin either to the plaintiff or to the defendant, to make a jury of the country between the parties in the action, because as well the plaintiff as the defendant, between whom the matter in variance is, have put themselves upon that jury; and that he return the names of the jurors, &c.

By the statute *Westm. 2. (13 Edw. 1.) c. 30.* the clause of *nisi prius* was directed to be inserted in the *venire facias*; and at first, the trial was had upon that writ^c, as it still is, in the case of a trial at bar. This practice was attended with many inconveniencies: for in the first place, the jury were not obliged to attend, under any penalty, on the day of *nisi*

^b Stat. 4 & 5 W. & M. c. 24. § 15. and by the 3 Geo. II. c. 25. § 18. any leaseholder, for the term of 500 years absolute, or for any term determinable upon life or lives, of an estate in possession in his own right, of the clear yearly value of twenty pounds or upwards, over and above the rent reserved, is qualified to serve upon juries; and in London, any person is qualified, who is a house-holder within the city, and has lands, tenements, or personal estate, to the value of one hundred pounds. Same statute, § 19.

^c Gilb. C. P. 74. 2 Salk. 454. 2 Ld. Raym. 1143. S. C.

prius;

prius; and if they did attend, the defendant might have cast an *essoign*, and so the jury, after much expence and trouble, were obliged to return, leaving the cause untried^d. Another inconvenience was, that the parties, not seeing the panel beforehand, could not be prepared to make their challenges^e. To obviate this latter inconvenience, it was enacted, by the statute 42 *Edw. 3. c. 11.* that “no inquests, except of assize and gaol delivery, shall be taken by writ of *nisi prius*, or otherwise, at the suit of any one, before the names of all them that shall pass in the inquests shall be returned in court.” From thenceforward, the clause of *nisi prius* could not be inserted in the *venire facias*, as was directed by the statute *Westm. 2.*; and therefore it was taken out of that writ, and placed in the *distringas*^f, as the practice continues to this day. The *venire* too was made returnable on a day before the trial, by which means they got rid of the *essoign* at *nisi prius*; for by the statute of *Marlbridge*, (52 *Hen. 3.*) c. 13. “after a man hath put himself upon any inquest, he shall have but one *essoign*, or one default;” and, by the statute *Westm.*

^d Gilb. C. P. 74, 5, 78.

^e *Id.* 77. 2 Salk. 454. 2

^f *Id.* 76, 7.

Ld. Raym. 1143. S. C.

2. (13 *Edw.* 1.) c. 27. the *essoign* shall be allowed him at the *next* day, which is the day of the return of the *venire*^g. And though the defendant never appears now, upon the return of the *venire*, yet heretofore he was demanded solemnly; and if he made default, there went out a *distringas* against the jury, with a clause in it, to distrain the defendant: and if after this, he made default again, it was peremptory, because there was no process left to bring him in^h. If a *venire* be awarded, and the parties do not go to trial for several terms, a new *venire* is awarded from term to term, and the cause is continued by *vicecomes non misit breve*ⁱ; but the *venire* never in fact issues, till the term when the cause is tried.

The *distringas*, upon which the trial is had, is a judicial writ, commanding the sheriff, or other officer to whom it is directed, to *distrain* the jurors, by all their lands and chattels, &c. so that he may have their bodies before the king at *Westminster*, or (*by original*) wheresoever, &c. on [the first return day

^g Gilb. C. P. 74, 5. 77. ^h 1 Salk. 216. 2 Ld.
8. 1 Salk. 216. 2 Ld. Raym. Raym. 925. S. C.
925. S. C. 2 Salk. 454. 2 ⁱ Gilb. C. P. 83.
Ld. Raym. 1143. S. C.

in term, after the trial,] before the chief justice, or judges of assize, if they shall first come on [the day of trial,] at [the place where the cause is intended to be tried,] to make a certain jury between the said parties, of a plea of, &c. (according to the nature of the action,) and to hear thereof their judgment of many defaults, &c.

After a *distringas* had issued, with a clause of *nisi prius*, if the cause stood over, for default of jurors, till a subsequent term, the plaintiff, at common law, could not have had a *venire de novo*^j, unless for some fault in executing or returning the *distringas*^k; but he must have sued out an *alias* or *pluries distringas*, for bringing in the same jury. And still, if after a *special* jury has been struck, the cause goes off for default of jurors; no new jury can be struck; but the cause must be tried by the jury first appointed^l. And the same jury shall serve for the trial of the cause, notwithstanding an intermediate change of sheriffs^m.

But, with regard to *common* juries, it is enacted, by the statute 7 & 8 W. III. c. 32. § 1. "That if any plaintiff or demandant,

^j Gib. C. P. 83.

^k *Id.* 92. 5 T. R. 464.

^l 5 T. R. 453.

^m Cowp. 412.

"in

“ in any cause depending in any of the courts
 “ at *Westminster*, which shall be at issue, shall
 “ sue forth, or bring to any sheriff, any writ
 “ of *venire facias*, upon which any writ of
 “ *habeas corpora* or *distringas*, with a *nisi prius*,
 “ shall issue, in order to the trial of such issue
 “ at the assizes, and such plaintiff or demand-
 “ ant shall not proceed to the trial of the said
 “ issue, at the said first assizes after the *teste* of
 “ every such writ of *habeas corpora* or *distrin-*
 “ *gas*, with a *nisi prius*, that then and in all
 “ such cases, (other than where *views* by
 “ jurors shall be directed ⁿ;) the plaintiff or
 “ demandant, whensoever he shall think fit to
 “ try the said issue at any other assizes, shall
 “ sue forth and prosecute a new writ of *venire*
 “ *facias*, directed to the sheriff, in this form :
 “ that you cause to come *anew* before, &c.
 “ twelve free and lawful men of the *neigh-*
 “ *bourhood* of *A.* [now, of the *body* of your
 “ county,] each of whom has *ten* pounds a
 “ year, of lands, tenements or rents, at the
 “ least, by whom, &c. and who neither, &c.
 “ and the residue of the said writ shall be af-
 “ ter the ancient manner; which writ being
 “ duly returned and filed, a writ of *habeas*
 “ *corpora* or *distringas*, with a *nisi prius*, shall

ⁿ Com. Rep. 243.

“ issue

“ issue thereupon, (for which the antient and
 “ accustomed fees shall be taken, and no
 “ more, as in the case of the *pluries habeas*
 “ *corpora* or *disstringas*, with a *nisi prius*,) upon
 “ which the plaintiff or demandant shall and
 “ may proceed to trial, as if no former writ
 “ of *venire facias* had been prosecuted or filed
 “ in that cause, and so *toties quoties* as the
 “ case shall require. And if any defendant
 “ or tenant, in any action depending in any
 “ of the said courts, shall be minded to bring
 “ to trial any issue joined against him, when,
 “ by the course in any of the said courts, he
 “ may lawfully do the same by *proviso*, such
 “ defendant or tenant shall or may, of the issuable term next preceding such intended
 “ trial, to be had at the next assizes, sue out
 “ a new *venire facias* to the sheriff, in form
 “ aforesaid, by *proviso*; and prosecute the
 “ same by writ of *habeas corpora* or *disstringas*,
 “ with a *nisi prius*, as though there had not
 “ been any former *venire facias* sued out or
 “ returned in that cause, and so *toties quoties*
 “ as the matter shall require.”

The *venire* and *disstringas* are in general directed to the *sheriff* of the county in which the action is laid; but where the sheriff is a party, or interested in the cause, they are directed

rected to the *coroner*^o; or if there are two sheriffs, and one of them is interested, to the other; and if the coroner, as well as the sheriff is interested, the *venire* and *distringas* are directed to two persons, appointed by the court, called *elisors*^p. When a fair and impartial, or at least a satisfactory trial cannot be had, in the county where the action is laid, the *venire* and *distringas* are directed to the sheriff of the next county^q, where the kings writ of *venire* runs^r. And when the action is laid in a place where the king's writ of *venire* does not run, as in *Wales*, and *Berwick upon Tweed*^s, &c. they are directed to the sheriff of the next *English* county. In a county *Palatine*, the record is sent by *mittimus* to the justices there, commanding them to issue the jury process, and, when the cause is tried, to send the record back again, to the court above. At what time the practice originated, of sending records by *mittimus* into counties *Palatine*, is not quite clear; but so late as the 11 *W. III.* the court expressly said, they could not order a trial in the county *Palatine* of *Lancaster*, and

^o 2 Lil. P. R. 124.

^r 1 T. R. 363.

^p Barnes, 465.

^s 2 Bur. 855.

^q 3 Bur. 1333.

there-

therefore they sent the record to be tried in *Yorkshire*, as being the next county ^t.

In point of form, the *venire* and *distringas* are general, or special. Where there is only one issue to be tried, or several issues of the same nature, the *venire* and *distringas* are general, to make a jury of the country, between the parties, of the plea or action, whatever it may be. But where there are several issues, in fact and in law, or several defendants, and some of them plead, and others let judgment go by default, the writs are special, as well to try the issues in fact, as to assess the damages upon the issues in law, or against the defendants who let judgment go by default ^u. If the defendant carry down the cause by *proviso*, the following clause is inserted in the *distringas*; *Provided always, that if two writs shall come to the sheriff, he shall only execute and return one of them* ^v. The *venire facias* is tested on the first day of the term, in or after which the cause is to be tried ^w, and is made returnable on some day before the trial; if in a country cause, the last day of the term before the assizes: and the *distringas* is tested,

^t 12 Mod. 313. and see
Say. Rep. 47. 1 T. R.
368.

^u 2 Lil. P. R. 636.

^v *Id.* 612, 617.

^w Imp. K. B. 332.

on the return of the *venire*; and made returnable on the first return day after the trial^x. These writs are sued out together; and after being sealed, for they do not require signing, are taken to the sheriff's office, to be returned.

The jury returned by the sheriff, on the *venire facias*, is *common* or *special*. A common jury is nominated, summoned, and returned by the sheriff, pursuant to the *balloting* act, (3 Geo. II. c. 25.) § 8. by which it is enacted, "that every sheriff or other officer, "to whom the return of the *venire facias* "*juratores*, or other process for the trial of "causes, before justices of assize or *nisi prius*, "in any county in *England*, doth or shall be- "long, shall, upon his return of every such "writ of *venire facias*, (unless in causes in- "tended to be tried at bar, or in cases where "a special jury shall be struck by order or "rule of court,) annex a panel to the said "writ, containing the christian and surnames, "additions and places of abode, of a compe- "tent number of jurors, named in the lists "mentioned in the act, as qualified to serve "on juries, (the names of the same persons to "be inserted in the panel, annexed to every

^x Imp. K. B. 333.

“ *venire facias*), for the trial of all issues at the
“ same assizes in each respective county ;
“ which number of jurors shall be not less
“ than forty-eight in any county, nor more
“ than seventy-two, without direction of the
“ judges appointed to go the circuit, and sit
“ as judges of assize or *nisi prius* in such county,
“ or one of them, who are thereby respec-
“ tively impowered and required, if he or
“ they see cause, by order under his or their
“ respective hand or hands, to direct a greater
“ or lesser number, and then such number as
“ shall be so directed shall be the number to
“ serve on such jury ; and that the writs of
“ *habeas corpora juratorum*, or *distringas*, sub-
“ sequent to such writ of *venire facias jura-*
“ *tores*, need not have inserted, in the bodies
“ of such respective writs, the names of all
“ the persons contained in such panel, but it
“ shall be sufficient to insert in the mandatory
“ part of such writs respectively, *the bodies*
“ *of the several persons named in the panel*
“ *to this writ annexed*, or words of the like
“ import, and to annex to such writs respec-
“ tively, panels, containing the same names as
“ were returned in the panel to such *venire*
“ *facias*, with their additions and places of
“ abode, that the parties concerned in any
“ such

“such trials may have timely notice of the
“jurors who are to serve at the next assizes,
“in order to make their challenges to them,
“if there be cause; and that for the making
“the returns and panels aforesaid, and an-
“nexing the same to the respective writs, no
“other fee or fees shall be taken, than what
“were then allowed by law to be taken for the
“return of the like writs and panels annexed
“to the same; and that the persons named
“in such panels shall be summoned to serve
“on juries, at the then next assizes or sessions
“of *nisi prius* for the respective counties to
“be named in such writs, and no other.”

And, by § 11. “the name of each and
“every person who shall be summoned and
“impanelled as aforesaid, with his addition
“and the place of his abode, shall be written in
“several and distinct pieces of parchment or
“paper, being all as near as may be of equal
“size and bigness, and shall be delivered
“unto the marshal of such judge of assize
“or *nisi prius*, &c. who is to try the cause in
“the said county, by the under-sheriff of the
“said county, or some agent of his; and
“shall, by direction and care of such marshal,
“be rolled up, all as near as may be in
“the same manner; and put together in

“ a box or glass, to be provided for that
“ purpose.”

Upon the execution of a writ of inquiry, the plaintiff, we may recollect, sometimes moves the court for a rule to have a *good jury*^y, which is a better sort of *common jury*^z: and, before the introduction of special juries, this rule appears to have been frequently granted, for the trial of causes at *nisi prius*^a.

A *special jury* is nominated, in the presence of the attornies on both sides, by the secondary, or master of the King's Bench office, who makes out a list of forty eight jurors, from the freeholders' book, or book kept by the sheriff, of persons qualified to serve on juries, out of whom each party is at liberty to strike twelve, and the remaining twenty-four are summoned and returned by the sheriff. Special juries appear to have been first introduced upon trials at bar, in causes of great consequence; wherein the court would very early make a rule, upon motion and affidavit, for the secondary to name forty-eight freeholders, and that each party should strike out twelve, by one at a time, (the plaintiff or his attorney beginning first), and that the remaining twenty-four should be

^y *Ante*, 319.

^a 1 S.R. 265.

^z 5 T.R. 460.

the jury, to be returned for the trial of the cause^b. A rule having been made accordingly, the plaintiff's attorney attended the secondary, but the defendant's attorney would not attend, and thereupon the secondary nominated forty-eight, in the presence of the plaintiff's attorney only: upon a motion to set aside this nomination, the court thought fit to order a new jury to be struck; but made it a standing rule for the future, that when the secondary is to strike a jury, he shall give notice to the attornies on both sides to be present, and if one comes and the other does not, he that appears shall, according to the ancient course, strike out twelve, and the master shall strike out the other twelve, for him that is absent^c. If, by rule of court, the secondary is ordered to strike a jury, in case it be not expressed in the rule that he shall strike forty-eight, and each of the parties shall strike out twelve, the secondary is to strike twenty-four, and the parties have no liberty to strike out any^d.

Analogous to the practice upon trials at bar, it was sometimes usual, in other cases, where it was conceived an indifferent jury

^b 2 Lil. P. R. 123.

R. T. 8 W. III. reg. 2.

^c 1 L. 127. 2 Salk. 405.

^d 2 Salk. 405.

would not be returned, for the court upon motion to order the sheriff to attend the secondary, with the freeholders' book, and the secondary, in the presence of the attornies on both sides, to strike a jury^e. But probable matter must have been shewn to the court, to induce them to grant this rule^f: and it being doubted, whether it could be had without consent^g, it was declared and enacted by the statute 3 Geo. II. c. 25. § 15. "that it
 " shall and may be lawful to and for his Ma-
 " jesty's Courts of King's Bench, &c. on the
 " motion of any plaintiff or plaintiffs, defen-
 " dant or defendants, in any action, cause or
 " suit whatsoever, depending or to be brought
 " and carried on in the said courts of King's
 " Bench, &c. and the said courts are thereby
 " authorized and required, upon motion as
 " aforesaid, to order and appoint a jury to be
 " struck, before the proper officer of each
 " respective court, for the trial of any issue
 " joined in any of the said cases, and triable
 " by a jury of twelve men, in such manner as
 " special juries have been and are usually
 " struck in such courts respectively, upon
 " trials at bar had in the said courts; which

^e 2 Lil. P. R. 123.

^g *Id.* 122.

^f *Id.* *ibid.*

“ said jury so struck as aforesaid, shall be
 “ the jury returned for the trial of the said
 “ issue.”

Upon this statute it was holden, that the fees for *striking* a special jury should be paid by the party applying for it; but that the other expences of the trial should abide the event of the suit^h. This being found inconvenient, gave rise to the statute 24 Geo. II. c. 18. § 1. by which it is enacted, “ that the
 “ party who shall apply for a special jury shall
 “ not only bear and pay the fees for striking
 “ such jury, but shall also pay and discharge
 “ all the expences, occasioned by the trial of
 “ the cause by such special jury; and shall not
 “ have any further or other allowance for the
 “ same, upon taxation of costs, than such party
 “ would have been entitled unto, in case the
 “ cause had been tried by a common jury,
 “ unless the judge before whom the cause is
 “ tried shall, immediately after the trial, cer-
 “ tify in open court, under his hand, upon the
 “ back of the record, that the same was a
 “ cause proper to be tried by a special jury.”
 And, by the same statute, § 2. “ no person,
 “ who shall serve upon a special jury, shall be

^h Say. Costs, 181. 2 Str. Barnes, 123. S. C.
 1080. Cal. Pr. C. B. 138.

“ allowed or take, for serving on any such jury, more than the judge who tries the cause shall think just and reasonable, not exceeding one pound one shilling, except in causes where a view hath been directed.”

Since the making of this statute, the motion for a special jury is become a motion of course,* requiring only counsel's signature; upon which a rule is drawn up, by the clerk of the rules, and an appointment obtained thereon from the master, to nominate the forty-eight¹. A copy of this rule and appointment is served upon the opposite attorney, and also on the under-sheriff, who attends the master, at the time appointed, with the freeholders' book; and, the nomination being made, lists of the persons nominated are made out for each party, by the master's clerk¹. Another appointment is then obtained from the master, to reduce the jury, and served on the opposite attorney; upon which, the attornies on both sides should attend, and the master will strike out twelve names for each of them, beginning with the plaintiff first, or if either of the attornies does not attend, he will strike out twelve

¹ Imp. K. B. 324.

names for him that is absent^k. The plaintiff, it seems, ought in all cases to sue out the jury process, even though the special jury be moved for by the defendant^l; and in *London*, he chuses his own officer to summon them.

The facility of obtaining a rule for a special jury is attended with this inconvenience, that when the cause is to be tried at a sitting in term, the defendant, by obtaining it, may put off the trial, till the sittings after term, it not being usual to try special jury causes in term time; by which means, the plaintiff is delayed from getting judgment till the next term, which may be at the distance of some months. To obviate this inconvenience, it might be proper to make the defendant, in such case, undertake to give judgment, of the term in which the cause would otherwise have been tried.

In actions of *waste*, trespass *quare clausum fregit*, and other actions, where it appears to the court to be proper and necessary, that the jurors, whether common or special, who are to try the issues, should, for the better under-

^k R. T. 8 W. III.

^l Imp. K. B. 324.

standing

standing of the evidence, have the *view* of the messuages, lands, or place in question, the court is authorised by the statute 4 & 5 *Ann. c. 16. § 3.* “to order special writs of *distingas* or *habeas corpora* to issue, by which the sheriff, or other officer to whom they are directed, shall be commanded to have six out of the first twelve of the jurors named in such writs, or some greater number of them, at the place in question, some convenient time before the trial, who then and there shall have the matters in question shewn to them, by two persons in the said writs named, to be appointed by the court; and the said sheriff or other officer, who is to execute the said writs, shall, by a special return upon the same, certify that the view hath been had, according to the command of the said writs.” And, by the 3 *Geo. II. c. 25. § 14.* “where a view shall be allowed in any cause, that in such case six of the jurors named in such panel, or more, who shall be mutually consented to by the parties, or their agents on both sides, or, if they cannot agree, shall be named by the proper officer of the respective courts of King’s Bench, &c. for the causes in their respective courts, or, if need be, by a judge of the
“ respective

“respective courts where the cause is depend-
“ing, or by the judge or judges before whom
“the cause shall be brought on to trial respec-
“tively, shall have the view, and shall be first
“sworn, or such of them as appear, upon the
“jury to try the said cause, before any draw-
“ing as directed by the act; and so many
“only shall be drawn, to be added to the
“viewers who appear, as shall, after all de-
“faulters and challenges allowed, make up
“the number of twelve, to be sworn for the
“trial of such cause.”

Before the statute 4 & 5 *Ann.* c. 16. there could be no view, till after the cause had been brought on to trial; when, if the court saw the question involved in any obscurity, which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on again^m. Upon this statute, it had become the practice to grant a view of course, upon the motion of either party: and a notion having prevailed, that six of the first twelve, upon the panel, must attend upon the view, and that if they did not appear at the trial, the cause must be put off, Lord *Mansfield*, and the rest of the judges, thought it their duty to interfere, and to take

^m 1 Bur. 253.

care that their ordering a view should not obstruct the course of justice, and prevent the cause from being tried; for they were all clearly of opinion, that the act of Parliament meant that a view should not be granted, unless the court were satisfied that it was proper and necessary; and they thought it better, that a cause should be tried upon a view had by any six, or by fewer than six, or even without any view at all, than that the trial should be delayed for a great length of time. Accordingly they resolved, not to order a view any more, without a full examination into the propriety and necessity of it, unless the party applying would come into such terms, as might prevent an unfair use being made of it^a. Agreeably to this resolution, they required a consent, which has ever since been made a part of the rule, that in case no view be had, or if a view be had by any of the jurors, though not six of the first twelve, yet the trial shall proceed, and no objection be made on either side, on account thereof, or for want of a proper return to the writ^b.

In actions of *waste*, and trespass *quare clausum fregit*, the necessity for a view appearing on the face of the pleadings, the motion for

^a 1 Burr. 253.

^b Id. 257.

it is a motion of course, requiring only counsel's signature; upon which a rule of court is drawn up in term time, or a judge's order in vacation^p. But in other cases, a special application must be made for the rule or order, to the court or a judge, upon an affidavit of the circumstances; and it is always made a part of the rule or order, that the expences of taking the view shall be equally borne by both parties, and that no evidence shall be given on either side, at the time of taking thereof. Before the rule or order is drawn up, an application should be made to the opposite attorney, for the name of his shewer; and the names of both shewers must be inserted in the rule or order, and also in the writ, with the time and place of meeting for proceeding on the view^q. The rule or order being drawn up, a copy of it must be served on the opposite attorney, and the original left with the sheriff, together with the names of the jurors, if *special*, and he will summon them; if *common*, he will summon such as he thinks proper^r.

^p Imp. K. B. 326, 7.

^q *Id. ibid.*

C H A P. XXXVI.

Of Witnesses.

THE next thing to be attended to is the *Evidence*; for unless the parties are prepared to prove their allegations, it is needless for them to go to trial: and herein, there are two things to be principally considered in every action, first, what is to be proved; and secondly, the manner of proving it. The evidence, in all cases, is governed by the pleadings; it being necessary to prove every thing that is put in issue, and no more. On the general issue, the plaintiff must prove the whole of his case; but on a special issue, it is only necessary for him to prove the particular point referred to the jury; for whatever is not expressly denied, is admitted by the pleadings. The manner of proof depends on the nature of the evidence, which is written or unwritten^a: the former is of a *public* or *private* nature, and is either found in the custody

^a Gilb. Evid. Bul. Ni. Pri. 221.

of the parties, or of third persons; the latter arises from the testimony of *witnesses*. In general, the parties must come prepared with the best existing evidence, the nature of the case admits of; and the witnesses must be such, as are not interested in the event of the suit^b. But when an objection is made to a witness, that admits of any doubt, the courts, of late years, have endeavoured as far as possible, consistently with the old cases, to let the objection go to his *credit*, rather than his *competency*^c.

The mode of procuring the attendance of witnesses, is by *subpœna ad testificandum*; which is a judicial writ, commanding them to appear at the trial, *to testify* what they know in the cause, on the part of the plaintiff or defendant, as the case is, under the penalty of one hundred pounds each. Four witnesses only can be put in one writ of *subpœna*^d; and therefore it is frequently necessary to have several writs, which are signed and sealed.

If a witness have in his possession any deeds or writings, which it is deemed

^b *Caf. temp. Hardw.* 358.

^c Same cases, 1 T. R.

4 Bur. 2251. 3 T. R. 300.

27.

^d *Cowp.* 846.

necessary

necessary to produce at the trial, there should be a special clause inserted in the *subpœna*, called a *duces tecum*, commanding the witness to bring them with him; or, which is the more usual way, a *notice* to produce them should be given to the witness, at the time of serving the *subpœna*. A similar notice is also given in some cases, to the opposite party, his attorney or agent: And, in penal actions, it is not necessary to give the notice to the defendant himself; notice to his attorney or agent being deemed sufficient^e.

The *subpœna* being issued, a ticket should be made out for each witness, and personally delivered to him^f, a reasonable time before the day of trial; for witnesses ought to have a convenient time, to put their own affairs in such order, as that their attendance upon the court may be of as little prejudice to themselves as possible^g: and notice in *London*, at two in the afternoon, for the witness to attend the sittings at *Westminster* that evening, has been held to be too short. Where the witness lives within the weekly bills of mortality, it is usual to leave a shilling with the *subpœna* ticket: but where he lives at a greater

^e 3 T. R. 306.

^g 1 Str. 510.

^f 2 Str. 1054.

distance,

distance, he is not obliged to attend, unless his reasonable expences are paid or tendered him, not only for going to, but also for returning from the trial; and where less is offered, the witness is not obliged to trust to the court's allowing him more, when he comes to the book, for perhaps the party may not call him, and then it may be difficult for him to get home again ^h.

If the witness, not having a sufficient excuse, neglect to attend upon the *subpœna*, he is liable to be proceeded against three ways; first, by attachment, for a contempt of the process of the court ⁱ; secondly, by a special action on the case for damages, at common law ^k; and thirdly, by action on the statute 5 Eliz. c. 9. § 12. for the penalty of ten pounds, and also for the further recompence given by that statute, if it has been previously assessed, by the court out of which the process issued ^l. An attachment lies against an attorney in the cause, for not attending, upon a *subpœna*, to give evidence of collateral

^h 2 Str. 1150. 1 Blac. Doug. 561.

Rep. 36.

^k Doug. 561.

ⁱ 1 Str. 510. 2 Str. 810, ^l *Id. ibid.*

1054, 1150. Cowp. 386.

facts^m; and it may be even had against a peer of the realmⁿ. But in order to ground this summary mode of proceeding, it is necessary to prove that the witness was personally served^o, and that his reasonable expences were paid or tendered him^p.

When the witness is detained in prison, a *babeas corpus ad testificandum* is necessary, to bring him up; for which an application is made to a judge, upon an affidavit, sworn to by the party applying^q, stating that he is a material witness, and willing to attend^r: Upon this application, the judge, if he think proper, will grant his *fiat* for the writ, which is then sued out, signed and sealed^s. But a *babeas corpus ad testificandum* will not lie, to bring up a prisoner of war^t: And where the application for it appeared to be a mere contrivance, to remove a prisoner in execution, the court refused to grant it^u. The writ being sued out, should be left with the sheriff,

^m 2 Str. 810. 2 Ld. Raym. 36.
ⁿ 1528. S. C. Cowp. 845. ^q Fortes. 396.
 but see 3 Bur. 1687. ^r Cowp. 672. *Per Cur.*
^o Say. Rep. 50. 1 Will. Hil. 1780.
^p 332. S. C. ^s Imp. K. B.
^q 2 Str. 1054. ^t Doug. 419.
^r *Id.* 1150. 1 Blac. Rep. ^u 3 Bur. 1440.

or other officer in whose custody the witness is detained, who will bring him up, on being paid his reasonable charges^v.

When a material witness is going, or resides abroad, so that he cannot attend at the trial, the party requiring his testimony may move the court, in term time, or apply to a judge in vacation, for a rule or order to have him examined on interrogatories, *de bene esse*, before one of the judges of the court, if he reside in town, or, if in the country or abroad, before commissioners specially appointed, and approved of by the opposite party^w. The rule or order for this purpose cannot be obtained without *consent*; the depositions of witnesses, upon interrogatories, not being the best existing evidence, the nature of the case admits of. The court however will do every thing in their power to make the parties consent, when necessary; as by putting off the trial, at the instance of the defendant, if the

^v 1 Crompt. 248, 9. *Qu.* the prisoner's escape. *Id.*
Whether the officer may not *ibid.*

require an *indemnity*, against ^w 1 Crompt. 229.

plaintiff will not consent^{*}: and if the defendant refuses, the court will not give him judgment as in case of a nonsuit.

The application, in the first instance, is for a rule or summons to shew cause, upon an affidavit, stating that the witness is material, and going or resident abroad; which being consented to, the court will make the rule absolute, or the judge an order upon the summons. The interrogatories should be then prepared, which are signed by counsel, and ought not to be too leading: this done, a copy of the interrogatories is given, in town, to the opposite attorney, with notice of the time when the witness is to be examined, in order that he may file cross interrogatories, if he think proper. At the time appointed, the witness is taken, with the interrogatories, to the judge's chambers, where he is examined by the judge's clerk; and his depositions being sworn to, copies are made out and delivered to the party requiring them[†]. If the witness reside in the country or abroad, a *dedimus potestatem* issues, which is annexed to the interrogatories, and the commissioners certify the answers under their seals[‡]. And

^{*} Doug. 419.

[‡] 1 Crompt. 229.

[†] Imp. K. B. 338.

as the depositions, in either case, are only taken *de bene esse*, they cannot be made use of, if the witness should happen to be in this country, at the time of the trial¹.

¹ 2 Salk. 691.

C H A P. XXXVII.

Of the Record of *Nisi Prius*, and
Arbitration.

THE last thing to be considered, previous to the trial, is the mode of making up and passing the record of *nisi prius*.

The record, which is supposed to be transcribed from the issue-roll, contains the pleadings, &c. as in the issue or paper-book; and is in nature of a commission to the judges at *nisi prius*, for the trial of the cause. It begins with the *placita*, or stile of the court, of the term issue was joined; and after a second *placita*^a, of the term the cause is tried, it concludes with the *jurata*, as follows:

—*to wit. The jury between A. B. by his attorney plaintiff, and C. D. defendant, of a plea of, &c. (according to the nature of the action) is respited before our lord the king at Westminster, (or, by original, wheresoever, &c.)*

^a For the reason of a second *placita* in the *King's-Bench*, and why it is omitted in the *Common Pleas*, where the parties do not go to trial, the same term issue is joined, see *Gilb. C.* P. 80, 81. & *Crompt.* 234.

until

until ——— (the return of the distringas) unless the king's right trusty and well beloved Lloyd Lord Kenyon, his majesty's chief justice, assigned to hold pleas before the king himself, (if in London or Middlesex; or, if at the assizes, unless his majesty's justices assigned to take the assizes, in and for the county of ———) shall first come on (the day of trial) at the Guildhall of the said city, (if in London; or if in Middlesex, at Westminster-hall, or, if at the assizes, at the place of trial, in the said county,) according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear: therefore let the sheriff have the bodies of the said jurors, to make the said jury, between the parties aforesaid, of the plea aforesaid, accordingly; the same day is given to the parties aforesaid, at the same place.

At the assizes, the *jurata* concludes with what is called the *sciendum*, as follows: *And be it known, that the king's writ on record was delivered to the deputy sheriff of the said county, on ——— the ——— day of ——— in this same term, (the last day of term preceding the trial) before our lord the king at Westminster, to be executed according to law, at his peril.*

The record of *nisi prius* was formerly made out by the clerks of the chief clerk^b; but it is now done by the attornies, and is to be fairly engrossed, on a press or skin of parchment, stamped with a double half-crown stamp^c. The record being engrossed, is carried to the *nisi prius* office, where it is sealed and passed, for which is paid seven shillings and six-pence for the first eight sheets, seven shillings for every eight sheets after, and six-pence to the sealer^d. In *London* and *Middlesex*, all records of *nisi prius* are to be sealed, on or before the respective days appointed by the Lord Chief Justice, in the sittings paper, for their trial^e. And there is an old rule of court, that no record of *nisi prius*, for the trial of an issue at the *assizes*, shall be sealed after the end of three weeks, next after the end of the term^f: But by obtaining a judge's order, for which the clerk is paid two shillings, and which he will procure at his leisure, the record may now be sealed, at any time before the *assizes*^g.

^b R. T. 1 Jac. II. R. M.

^c R. E. 7 Geo. I.

5 Ann. reg. 1.

^f R. T. 31 Car. II. and

^e R. M. 5 Ann. reg. 1.

(b).

see a former rule of T. 15 Car. II. reg. 2.

^d Same rule. (a).

^g R. T. 31 Car. II. (a).

If the issue has not been previously entered of record, it must be so entered, or at least an *incipitur* made, before the passing of the record of *nisi prius* : For it is a rule of court, that no record of *nisi prius* shall be sealed, or passed at the *nisi prius* office, by the *custos brevium*, or any clerk of that office, before the issue in that cause be fairly entered on record, or an *incipitur* thereof, and such entry, with the record of *nisi prius*, be first brought to and signed by the secondary ; for which no fee shall be demanded or paid, but the usual and accustomed fee, due to the chief clerk, for entry of such issue on record ^h. In practice it is usual, when the record has not been previously entered, to make an *incipitur* on a roll of the term issue was joined, and to take the roll, record of *nisi prius*, and draft of the issue, to the clerk of the judgments, who enters the issue, and marks the roll, record and issue paper, taking three shillings and six pence for the first ten sheets, and one shilling for every six more ⁱ.

The record of *nisi prius* being made up and passed, the cause is entered for trial. And in this stage of the proceedings, or more fre-

^h R. M. 5 Ann. reg. 1. Jac. II. *ante*, 472, 3.
See also the rules of H. ⁱ Imp. K. B. 331.
1649. E. 1657. and T. 1

quently at the trial, when one or other of the parties is commonly fearful of the event, the matter in dispute is sometimes referred to arbitration.

Arbitrations are of two kinds, first, where there is a cause depending in court, and secondly, where no cause is depending. The submission, in the former case, is either by *rule* of court originally, or by order of *nisi prius*, which is afterwards made a rule of court; and upon a submission of this kind, the plaintiff usually takes a verdict for his security, particularly when there is special bail, who would not otherwise be liable for the sum awarded. In the other case, the submission is by *agreement* of the parties, which is either in writing, or by parol; and when in writing, it is usually agreed that the submission shall be made a rule of court.

A submission to arbitration, by rule of court, of all matters in difference between the parties in the cause, is not confined to the subject matter in the particular action then depending; but will extend to cross demands between the parties, though not pleaded by way of set-off; and the costs being to abide the event, makes no difference^k: But a reference of all matters in difference in the cause,

^k 2 T. R. 645.

between the parties, is confined solely to the matters in dispute in that particular action, A submission to an award having been made a rule of court, between *A.* and *B.* the parties on the record, which award not having been made in time, the dispute was referred to a second arbitrator, by *B.* and *C.* who were the real parties in the suit, the court would not grant an attachment against *B.* for not obeying the award made by the second arbitrator, because the reference should have been made by the parties on the record; and even if it had, there should have been another rule, to make the second submission a rule of court: And as the court had no jurisdiction in this case, they could not go into the merits, though *B.* consented to waive the objection¹.

It was formerly holden, that a reference to arbitration was an implied stay of proceedings^m. But in the beginning of queen *Ann's* time, a rule was made, that no reference whatsoever, of any cause depending in this court, should stay the proceedings; unless it was expressed, in the rule of reference, to be agreed, that all proceedings in this court should be stayedⁿ.

¹ 2 T. R. 643.

ⁿ 2 Ld. Raym. 789.

^m 1 Mod. 24.

There

There are several ways however, in which the power of arbitrators may be legally determined; as first, by *death*; secondly, by their not making an award, within the time limited; thirdly, by their *disagreement*, and refusal to act or intermeddle any further, or by their appointing an umpire to act for them^o; and fourthly, by the *revocation* of the parties: respecting which it is laid down, that although a man be bound in a bond to stand to the arbitrament of another, yet he may countermand or revoke the power of the arbitrator; for a man cannot, by his own act, make an authority power or warrant not countermandable, which by the law and of its own nature may be countermanded^p: But by this countermand, or revocation of the power of the arbitrator, the bond is forfeited, and the obligee shall take the benefit thereof^q. A matter was referred by consent at *nisi prius*, to the three foremen of the jury, and before the award was made, one of the parties served the arbitrators with a *subpœna* out of Chancery, which hindered their proceeding to make the award; the court held this to be a breach of

^o 1 Rol. Abr. 261, 2. 1 70, 71, 72.

Sid. 428. 2 Saund. 129. 1 ^p 8 Co. 82.

Lev. 174, 285, 302. 3 Lev. ^q *Id. ibid.* T. Jon. 134.
263. 2 Vent. 113. 1 Salk.

the rule, and granted an attachment *nisi*^r. So where the parties, upon a reference, consented to abide by the award, and not to bring any bill in equity, and their submission was made a rule of court, and after an award made, one of them filed a bill in Chancery against the other, the court made a rule absolute for an attachment^s.

When a cause is referred at the trial, it is usual to get the witnesses sworn, before they leave the court^t; otherwise (if required) they must be sworn before a judge: And the order of *nisi prius* being obtained, from the clerk of *nisi prius* in *London* or *Middlesex*, or from the judge's associate at the assizes, the arbitrator will make an appointment in writing, of a time and place for the parties and their witnesses to attend him; which appointment should be subscribed to a copy of the order of *nisi prius*, and served therewith on the defendant's attorney^u: And, previous to the meeting, the arbitrators should be furnished with a state of the case, and the names of the witnesses, &c. A similar mode of proceeding is to be observed, where the reference is by agreement without suit.

^r 1 Salk. 73.

^s 3 Bur. 1256.

^t Imp. K. B. 650.

^u *Id.* 651.

The arbitration then proceeds : and it has been holden that arbitrators, having power to choose an umpire, may elect one before they enter upon the examination of the matter referred to them^v. If the arbitrator cannot make his award, within the time limited by the order of *nisi prius*, a rule may be obtained, by *consent*, for enlarging it; or where the submission is by agreement without suit, the time may be enlarged by *consent* of the parties. The rule, when necessary, is drawn up by the clerk of the rules, on a brief or motion paper, signed by the counsel on both sides, and a copy of it served, with an appointment thereon; but before this rule can be obtained, a motion must be made, for making the order of *nisi prius* a rule of court^w.

References made by rule of court having been found to contribute much to the ease of the subject, in the determining of controversies, the parties being obliged thereby to submit to the award, under the penalty of imprisonment, it was enacted, by the statute 9 and 10 W. III. c. 15. § 1. " that it shall and may
 " be lawful for all merchants and traders,
 " and others desiring to end any controversy,
 " suit or quarrel, for which there is no other

^v 2 T. R. 644.

^w Imp. K. B. 651.

" remedy

“ remedy but by personal action or suit in
“ equity, by arbitration, to agree that their
“ submission of their suit to the award or um-
“ pirage of any person or persons, should be
“ made a rule of any of his majesty’s courts
“ of record, which the parties shall choose,
“ and to insert such their agreement in their
“ submission, or the condition of the bond or
“ promise, whereby they oblige themselves
“ respectively, to submit to the award or um-
“ pirage of any person or persons; which
“ agreement being so made, and inserted in
“ their submission or promise, or condition of
“ their respective bonds, shall or may, upon
“ producing an affidavit thereof made by the
“ witnesses thereunto, or any one of them, in
“ the court of which the same is agreed to be
“ made a rule, and reading and filing the said
“ affidavit in court, be entered of record in
“ such court, and a rule shall thereupon be
“ made by the said court, that the parties
“ shall submit to, and finally be concluded by
“ the arbitration or umpirage which shall be
“ made concerning them, by the arbitrators
“ or umpire, pursuant to such submission;
“ and in case of disobedience to such arbitra-
“ tion or umpirage, the party neglecting or
“ refusing to perform and execute the same,
“ or

“ or any part thereof, shall be subject to all the
 “ penalties of contemning a rule of court,
 “ when he is a suitor or defendant in such
 “ court, and the court on motion shall issue
 “ process accordingly, which process shall
 “ not be stopped or delayed in its execution,
 “ by any order, rule, command, or process of
 “ any other court, either of law or equity,
 “ unless it shall be made appear on oath to
 “ such court, that the arbitrators or umpire
 “ misbehaved themselves, and that such
 “ award, arbitration or umpirage was pro-
 “ cured by corruption, or other undue means.”

The intent of this act was to put submissions,
 where no cause was depending in court, upon
 the same footing with those, where there was
 a cause depending; and it is only declaratory
 of what the law was before, in the latter
 case*.

A *parol* submission is not within the statute;
 nor a submission in writing, unless it is agreed
 to be made a rule of court. But where there
 is such an agreement, it seems that the court
 will enforce the execution of a *parol* award by
 attachment†. A consent, in the arbitration
 bond, to make the *award* a rule of court, in-
 stead of the *submission*, will not warrant the in-

* 2 Bur. 701.

† Barnes, 54.

terposition of the court, under this act^z. But where a submission was by bond, and at the end of the condition there was this clause, *And if the obligor shall consent, that this submission be made a rule of court, that then, &c.* the court on motion held these conditional words to be a sufficient indication of consent, and made the award a rule of court^a. So where the agreement, to make the submission a rule of court, was no part of the condition, but was there-under written, and not signed; it appearing by affidavit that the subscription was made, before the execution of the bond, it was taken by the court to be part of the condition, as an indorsement by way of defeazance is part of the deed; and the submission was made a rule of court^b.

It will next be proper to consider the *award*; and the mode of enforcing it, by the party in whose favour it is made, or of setting it aside, by the opposite party. The general requisites of an award are, that it be certain, mutual and final^c. But certainty to a common intent is sufficient^d: And

^z 2 Str. 1178.

^a 1 Salk. 72. 1 Ld. Raym. 674. S. C.

^b Barnes, 55.

^c See Bac. Abr. tit. *Arbitrament*, and Kyd on Awards.

^d 1 Bur. 274.

though the award is final, as to all matters referred, and decided upon by the arbitrators, yet upon a reference of all matters in difference between the parties, an award does not preclude the plaintiff from suing for a cause of action, existing against the defendant at the time of the reference, upon proof that the subject matter of such action was not laid before the arbitrators, nor included in the matters referred^c.

Where a cause is depending, the submission is either silent with regard to *costs*, or they are directed to abide the event of the award, or else to be in the discretion of the arbitrator. The power of awarding costs is necessarily consequent to the authority conferred upon the arbitrator, of determining the cause; and the reason why, in references of this sort, a provision is frequently inserted, that the costs shall abide the event of the award, is, that the arbitrator may not have it in his power to withhold costs from the party who is in the right: But that is to be considered as the restriction of a power, which he would otherwise necessarily have, of allowing costs at his election^f.

^c 4 T. R. 146.

^f 2 T. R. 644, 5.

Where

Where the costs are directed to abide the *event*, that must be taken to mean the legal event: therefore, where an action of trespass was brought for pulling down the plaintiff's gates, and assaulting him, and the defendants pleaded not guilty to the whole declaration, and justified, as to all the counts but one, under different rights of way; and the arbitrator awarded a right of way to the defendants, different from any of those set forth, and gave five shillings damages to the plaintiff for the assault, as having been committed, when the defendants were attempting to exercise a right of way, negatived by the arbitrator; the court held that the plaintiff could recover no more costs than damages, the award of the arbitrator not being tantamount to a judge's certificate, under the 22 and 23 *Car.* II. c. 9^s. Where the costs are left to the *discretion* of the arbitrator, he can only award common costs, as between *party* and *party*, and has not the power of awarding costs to be taxed or paid, as between *attorney* and *client*^h.

Whenever costs are generally awarded to be paid, it is always understood that they shall be taxed by the masterⁱ; but he will only

^z 3 T. R. 138.

Rep. 953. S. P.

^a Cowp. 127. ² Blac. ⁱ 2 Str. 737. Barnes, 56, 8.

tax them, to the time of the reference^k. And where an award was made, that one party should pay the other ten pounds, and the costs of a suit depending in an inferior court, and then to give mutual releases, the court held that to pay such costs as the master shall tax is good; for *id certum est, quod certum reddi potest*: but this is uncertain, and carries it farther than has hitherto been allowed^l. Where the cause goes off upon an ineffectual arbitration, and is afterwards tried, costs are allowed as upon a *remanet*^m.

The mode of enforcing an award, by the party in whose favour it is made, is by *action*, or, when the submission is made a rule of court, by *attachment*; and if a *verdict* has been taken for the plaintiff's security, by entering up *judgment* thereon, and taking out *execution*. Upon a submission being made a rule of court, it was formerly holden, that the party might proceed both by *action* and *attachment* at the same timeⁿ; but a different doctrine has been since laid down^o.

^k Barnes, 58, 123.

^k 1 Salk. 73.

^l 1 Salk. 75.

^o Andr. 299. Caf. temp.

^m 5 Bur. 2694.

Hardw. 106.

Where

Where the submission is by deed, with a penalty, an action of *debt* lies upon it, for the non-performance of the award; and that, whether the award be for the payment of money, or the performance of a collateral act: and an action of *debt* also lies, upon a submission by deed, without a penalty, or upon a submission in writing, without deed, or by parol, where the award is for the payment of money; but where it is for the performance of a collateral act, the plaintiff should proceed by action of *covenant* upon the deed, or, if the submission be without deed, by action on the *case*^p.

Where the submission is by rule of court originally, or by order of *nisi prius* on agreement, which is afterwards made a rule of court, the party disobeying an award is not only liable to an action, but also to an attachment, as for a contempt. And where the original award was lost, the court, on a proper affidavit, granted an attachment upon a copy of it^q. But before any application is made for an attachment, or to set aside an award^r, the submission must be made a rule of court, if not one already; which is done on

^p 2 Ld. Raym. 1040.

^r 2 Str. 1178.

^q 1 Str. 526.

an affidavit, by one of the witnesses, of the due execution of the bond, or agreement containing the submission; and if he refuse to make it, the court will compel him^o. But where a matter is referred to arbitrators, by rule of court, and they make their award, the court will compel a performance of it, as much as if the award were part of the rule; so that a new rule is needless^t.

The party having a remedy by action on the award, it is discretionary in the court, whether or not they will enforce it by attachment. And therefore, where there was a contrariety of evidence, they would not determine it upon affidavits, in a summary way^v. So, where the defendant was a bankrupt, and incapable of paying the sum awarded, the court refused an attachment for non-payment of it^v: and where a party was taken upon an attachment, for not performing an award, after which he became bankrupt and obtained his certificate, the court ordered him to be discharged; for this was a demand for which *debt* would lie, and the act says he shall not be arrested, *prosecuted* or impleaded for any debt

^o 1 Str. 1. Barnes, 58.

^v *Anon.* K. B. 1 Crompt.

^t 1 Salk. 71.

270.

^v 1 Str. 695.

due before the bankruptcy: it would therefore be hard to keep him in custody, when the duty is discharged ^w. A *feme sole* having agreed to a reference, was awarded to deliver up two notes, and pay a sum of money; she married, and the husband refusing to pay, it was doubted if the court could grant an attachment, against both or either of them ^x. A *foreign* attachment in *London*, if properly pleaded, is a good bar to an action of debt on bond, conditioned for the performance of an award ^y; but it is no answer to an attachment in this court, for non-payment of the sum awarded ^z.

In order to proceed by attachment, there must be personal notice of the award, and a demand of the money, or other thing awarded ^a; which demand may be made by the party himself, or by a third person, under a power of attorney: and at the time of demanding it, a copy of the rule must be served upon the opposite party, and of the master's *allocatur* thereon, if the demand is of taxed costs, and also a copy of the award, and

^w 2 Str. 1152.

^z *Grant v. Harvding*, 4

^x *Anon.* 1 Cromp. 270.

T. R. 313. *in notis.* 1

^y 1 Ld. Raym. 636. 3 Cromp. 270.

Salk. 49. S. C.

^a 12 Mod. 257.

of the power of attorney, if the demand is made by a third person; the original rule and *allocatur*, and also the award and power of attorney, when necessary, being at the same time produced and shewn^b. After a demand and refusal, the court upon an affidavit thereof, and of the due execution of the award, and power of attorney, will grant a rule for an attachment *nisi*, which they will afterwards make absolute, on an affidavit of service, if no sufficient cause be shewn to the contrary. Where a submission to an award is made a rule of court, under the statute, there being no action, the affidavits upon which to apply for an attachment, for disobeying the award, need not be intitled in any cause; but the affidavits in answer must^c: And if an affidavit be put into court, without any title, the court cannot take notice of it, though the adverse party is willing to waive the objection^d. The affirmation of a *Quaker* is not sufficient to ground an attachment, for the non-performance of an award^e.

Where a cause is referred at the trial, and a verdict taken for the plaintiff's security, and an award is afterwards made in his favour,

^b Imp. K. B. 651, 2.

^d 2 T. R. 643.

^c 3 T. R. 601. *Ante*. 262.

^e 1 Str. 441.

the plaintiff may make his election, either to proceed on the award, by action or attachment, or on the verdict, by moving the court for leave to sign judgment, and take out execution, for the money awarded^f. The affidavit for this purpose must state the due execution of the award, and the demand and refusal of the money, in like manner as on moving for an attachment^g: And if no cause be shewn to the contrary, the rule *nisi* will be made absolute.

The mode of setting aside an award is by application to the court, founded on some objection to its legality, appearing on the face of the award itself, or else on an affidavit of some irregularity, as want of notice of the meeting^h, or collusion or gross misbehaviour of the arbitratorsⁱ: And upon such an application, every ground of relief in equity, against an award, is equally open in this court^k. Or the objections to the award may be shewn for cause, against an attachment. But the court on motion will not enter into the merits at large; for if they did, no person

^f 1 Salk. 84.

^h 1 Salk. 71. but see 3

^g Imp. K. B. 653. Barnes, Atk. 529.

58.

ⁱ 3 Atk. 529. 2 Bur. 701.

^k 3 Bur. 1258, 9.

would

would ever undertake to be an arbitrator¹. And they will not set aside the award of an umpire, because he received evidence from the arbitrators, without examining the witnesses, unless he were required to re-examine them, before the making of his award^m.

By the statute 9 & 10 *W. III. c. 15. § 2.*
 “ Any arbitration or umpirage, procured by
 “ corruption or undue means, shall be judged
 “ and esteemed void and of none effect, and
 “ accordingly be set aside by any court of law
 “ or equity, so as complaint of such corrup-
 “ tion or undue practice be made, in the
 “ court where the rule is made for submission
 “ to such arbitration or umpirage, before the
 “ last day of the next term after such ar-
 “ bitration or umpirage made and published
 “ to the partiesⁿ. ”

And where the application is to refer back an award to the same arbitrator to re-consider it, on the ground that he had not sufficient materials before him, it must be made within the same time; although the arbitrator be not charged with corruption or undue means^o.

¹ 1 Salk. 71. 1 Str. 301.

ⁿ Cowp. 23. Barnes, 55.

³ Atk. 529. 2 Bur. 701.

^o 2 T. R. 781.

^m 4 T. R. 589.

But

But the 9 and 10 *W. III. c. 15. § 2.* which limits the time of complaining against awards, to the last day of the next term after the award made, extends not to such as are made in pursuance of an order of *nisi prius*, but only where the submission is by obligation ^p. And where the objections arise upon the face of the award, it seems they may be made at any time ^q.

^p 1 Str. 501. 2 Bur. 701. ^q Barnes, 57.

C H A P. XXXVIII.

Of Trials by the Country, and these
Incidents.

TRIALS by the country are at bar, or *nisi prius*. Before the statute *Westm. 2.* (13 *Ed. I.*) c. 30. civil causes were tried either at the bar of the court, or, when of no great moment, before the justices in *Eyre*: a practice having very early obtained, of continuing the cause from term to term, in the court above, provided the justices in *Eyre* did not previously come into the county, where the cause of action arose; and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices at *Westminster*, to that of the justices in *Eyre*^a. Afterwards, when the justices in *Eyre* were superseded, by the modern justices of assize, it was enacted, by the above statute, “that inquisitions to be taken of trespasses, pleaded before the justices of either

^a 3 *Blac. Com.* 352.“ *bench*,

“*bench*^b, shall be determined before the jus-
 tices of assize, unless the trespass be so hei-
 nous, that it requires great examination;
 “and that inquisitions of other pleas pleaded
 “in either bench, wherein the examination is
 “easy, shall be also determined before them;
 “as when the entry or seisin of any one is
 “denied, or in case a single point is to be in-
 “quired into: but inquisitions of many and
 “weighty matters, which require great ex-
 “amination, shall be taken before the justices
 “of the benches^c, &c.; and when such in-
 “quests are taken, they shall be returned into
 “the benches, and there judgment shall be
 “given, and they shall be enrolled.” Since
 the making of this statute, causes in ge-
 neral are tried at *nisi prius*; trials at bar being
 only allowed in *ejectment*, and other causes,
 which require great examination^c.

When the crown is immediately concern-
 ed, the Attorney General has a right to de-
 mand a trial at bar^d. In all other cases, it is

^b This Statute, extending only to the courts of King's Bench and Common Pleas, whenever an issue is joined in the Exchequer, to be tried in the country, there is a particular commission, authorising the judges of assize to try it. *Bul. Ni. Pri.* 304.
^c 2 Salk. 648.
^d 1 Str. 52, 644. 2 Str. 316. 1 Barnardist. K. B. 88. S. C.

entirely

entirely in the discretion of the court^c, governed by the circumstances of the case^f; even if the parties consent, such a mode of trial cannot be had, without leave of the court^g. The grounds on which this trial ought to be granted, are the great value of the subject matter in question, the probable length of the inquiry, and the likelihood that difficulties may arise in the course of it^h. In *ejectment*, it is said, the rule has been not to allow a trial at bar, except where the yearly value of the land is one hundred poundsⁱ; and value alone^j, or the probable length of the inquiry, is not a sufficient ground for it: but difficulty must concur; and in order to obtain it upon that ground, it is not sufficient to say generally, in an affidavit, that the cause is expected to be difficult; but the particular difficulty, which is expected to arise, ought to be pointed out, that the court may judge whether it be sufficient^k.

^c Say. Rep. 79.

ⁱ 1 Barnardist. K. B. 141.

^f 1 T. R. 367.

but see 1 Str. 479.

^g 2 Lil. P. R. 608. 1
Str. 696.

^j 2 Salk. 648.

^h *Per Kenyon, arg. Doug.*
437. and see 1 T. R. 363.

^k Say. Rep. 79. and see
2 Lil. P. R. 604. 1 Bar-
nardist. K. B. 141.

If one of the justices of either bench, or a master in Chancery, be concerned, it is a good cause for a trial at bar, be the value what it may^l: and it is said, that such trial was never denied to any officer of the court, nor hardly to any gentleman at the bar^m. The plaintiff may have a trial of this nature, by the favour of the court, though he sue *in formâ pauperis*ⁿ: but where the plaintiff is poor, the court will not grant it to the defendant, unless he will agree to take *nisi prius* costs, if he succeed, and, if he fail, to pay bar costs^o. In London, it is said, a cause cannot be tried at bar, by reason of their charter, which exempts them from serving upon juries out of the city^p. And where the cause of action arises in a county *Palatine*, it has been doubted whether this court can compel the inhabitants of the palatinate to attend as jurors^q.

^l 1 Sid. 407.

^m 2 Salk. 651. 6 Mod. 123. S. C. but see 2 Lil. P. R. 608.

ⁿ 12 Mod. 312.

^o 2 Salk. 648. Doug. 421. but see 2 Barnardist. K. B. 146.

^p 2 Lil. P. R. 607. 2 Salk. 644. But *note*, the great cause of *Lockyer* against

the *East India Company* was tried at bar, (M 2. Geo. III.) by a special jury of Merchants of London. 2 Salk. 644. 1 T. R. 366. In that case, however, the jury consented to be sworn, and waive their privilege. 2 Willf. 136.

^q Say. Rep. 47. and see 1 T. R. 363.

A trial

A trial at bar is never granted before issue joined^r, except in *ejectment*; in which, as issue is very seldom joined till the term is over, it would afterwards be too late to make the application^s. This sort of trial should regularly be moved for, in the term preceding that in which it is intended to be had; as in *Hilary* for *Easter*, and in *Trinity* for *Michaelmas* term^t, except where lands lie in *Middlesex*^u; and it is never allowed in an issuable term^v, unless the crown be concerned in interest^w, or under very particular and pressing circumstances^x. In *Easter* term, they did not formerly allow more than ten trials at bar^y; and they must have been brought on, a fortnight at least before the end of it^z, to allow sufficient time for the other business of the court.

Antiently, there was no other notice given of such trial, than the rule in the office; but

- ^r 2 Lil. P. R. 238, 608. *London*, M. 21 Geo. III.
^s 12 Mod. 331. ^t 1 Str. 696. ^u 2 Lil. P. R. 603. R. M.
^v 2 Barnardist. K. B. 125. ^w 4 Ann. (c.) 1 Str. 52.
^x 1 T. R. 564. *in notis*. ^y 2 Lil. P. R. 615. 1 Str.
^z Say Rep. 155. 52. 1 Barnardist. K. B.
¹ 2 Lil. P. R. 603, 611. 370.
² 2 Salk. 649. ³ 2 Lil. P. R. 607.
⁴ Fitzgib. 267. *Per Buller* ⁴ *Id.* 609.
 just. in *Coleman v. city of*

now there must be fifteen days notice ^a. The plaintiff however, as in other cases, may countermand his notice, and prevent the cause from being tried at the day appointed; after which, it cannot be brought to trial again, unless some new day be appointed by the court ^b: and it is said, that a second rule cannot be made for a trial at bar, between the same parties, in the same term ^c. Previous to giving notice, the day appointed for the trial must be entered with the clerk of the papers ^d; and it could not formerly have been on a *Saturday* ^e, or the last paper day in term, except in the king's case ^f.

A trial at bar is had upon the *venire facias* or *disfringas*, &c. as at common law, without any clause of *nisi prius*; and it is mostly by a *special* jury of the county where the action is laid ^g. Six days notice at least ought to be

^a 2 Salk. 649.

^b R. M. 4 Ann. (c.)

^c Fitzgib. 267.

^d 2 Lil. P. R. 608.

^e *Id.* 602.

^f 2 Salk. 625.

^g 2 Lil. P. R. 123. 1 Salk. 405. R. T. 8 W. III.

1 Bur. 292. but see Doug.

438. where the trial was

had, by *consent*, by a jury of a different county; and in *Wales* or *Berwick* upon *Tweed*, &c. or where an impartial trial cannot be had, the jury must come from the next *English* or adjoining county, where the king's writ of *venire* runs. 1 T. R. 363.

given to the jurors before the trial^h; and if a sufficient number do not attend to make a jury, the trial must be adjourned, and a *decem* or *octo tales* awarded, as at common lawⁱ; for the parties in this case cannot pray a *tales* upon the statutes^k. And no writ of *alias* or *pluries distringas*, with a *tales*, for the trial of issues at the bar, shall be sued out, before the precedent writ of *distringas*, with a panel of the names of the jury annexed, shall be delivered to the secondary of this court, to the intent that the issues forfeited by the jury, for not appearing upon the precedent writ, may be duly estreated^l. After a trial at bar, if the parties be dissatisfied with the verdict, they may move for a new trial, as in other cases^m.

Trials at *nisi prius* are always had in the county where the venue is laid, and where the fact was, or is supposed to have been committedⁿ; except where the venue is laid

^h Say. Rep. 30.

ⁱ 2 Lil. P. R. 123.

^j 5 T. R. 457, 8. 462.

^m Sty. Rep. 462, 466.

^k 35 Hen. VIII. c. 6. 2 Ld. Raym. 1358. 1 Str. 4 & 5 Ph. & M. c. 7. 5 El. 584. S. C. 2 Str. 1105. 1 c. 25. 14 El. c. 9. 7 & 8 Bur. 395. S. P. W. III. c. 32. § 3.

ⁿ 3 Bur. 1334.

Of Entering the Cause for Trial. 561

in *Wales*, or *Berwick upon Tweed*°, &c. or in a county where an impartial trial cannot be had, in which cases the cause shall be tried in the next *English* or *adjoining* county, where the king's writ of *venire* runs^p.

The parties being prepared, and ready to proceed to trial, the cause is *entered* with the clerk of the papers, on a trial at bar, or with the marshal at *nisi prius*. The old rule for entering causes in *London* and *Middlesex* was, that unless they were entered with the chief justice, two days before the sittings, upon which they were to be tried, the marshal might enter a *ne recipiatur*, at the request of the defendant or his attorney^q. And this rule still holds, with regard to trials at the sittings in term: But if a cause was to be tried at the sittings after term, no *ne recipiatur* could be entered, until after proclamation made, by order of the chief justice, for bringing in the record; and then, if the record was not brought in, the defendant's attorney might enter a *ne recipiatur*^r.

At present, the practice with regard to entering causes for trial, at the sittings after term

° 2 Bur. 859.

II. reg. 2.

^p 1 T. R. 363.

^r R. M. 4 Ann. (a).

^q R. H. 15 & 16 Car.

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or assizes, stands thus: In *Middlesex*, no record or writ of *nisi prius* will be received, at any sitting after term, unless the same shall be delivered to and entered with the marshal, within two days after the last day of every term; and in *London*, no record of *nisi prius* will be received, at any sitting after term, unless the same shall be delivered to and entered with the marshal, the day before the day to which the sittings in *London* shall be adjourned, by *nine* in the evening^s. At the *assizes*, the writ and record are entered together^t; and no writ and record of *nisi prius* shall be received, in any county in *England*, unless they shall be delivered to and entered with the marshal, before the first sitting of the court, after the commission day, except in the counties of *York* and *Norfolk*, and there the writs and records shall be delivered to and entered with the marshal, before the first sitting of the court, on the second day after the commission day, otherwise they shall not be received^u. And both in *London* and *Middlesex*, as well as at the *assizes*, every cause shall be tried in the order in which it is entered, beginning with *remanets*, unless it shall

^s Notice, M. 17 Geo. II.

^u R. H. 14 Geo. II.

^t R. T. 10 & 11 Geo. II.

be made out to the satisfaction of the judge, in open court, that there is reasonable cause to the contrary; who thereupon may make such order for the trial of the cause, so to be put off, as to him shall seem just^v. Special jury causes are appointed for particular days: and in *London* and *Middlesex* no cause can be tried by a special jury, unless the rule for such jury be drawn up, and the cause marked as a special jury, in the marshal's book of causes, before the adjournment-day after each term^w.

The cause being entered, stands ready for trial, at the bar of the court, or before the judge at *nisi prius*: and previous to its coming on, a *brief* should be prepared for each party, and delivered to counsel; containing a short abstract of the pleadings, a clear statement of the case, and a proper arrangement of the proofs, with the names of the witnesses. The grand rule to be observed in drawing briefs, as it is well expressed in a late useful publication^x, consists in conciseness with perspicuity.

When the cause is called on, the defendant may plead any matter of defence, arising

^v Same rule and *notice*,
M. 17 Geo. II.

^w R. T. 30 Geo. III.

^x *Sellen's practice*, 472.

after the *last* continuance, or as it is called in *French*, *puis darrein continuance*, or in *Latin*, *post ultimam continuationem*: and such a plea may be pleaded, after the jury are gone from the bar; but not after they have given their verdict ^v. The last continuance, previous to the sittings or assizes, is the day of the return of the *venire facias*, from whence the plea is continued, by the award of the *disfringas*, to the next term, unless the chief justice or judges of assize shall first come on the day of *nisi prius* ^z. And on this day, if any matter of defence has arisen after the last continuance, it may be pleaded by the defendant; as that the plaintiff has given him a release, or is a bankrupt, outlawed or excommunicated: So it may be pleaded, that a *feme* plaintiff is married, or, in *debt* by an administrator, that the plaintiff's letters of administration are revoked, *puis darrein continuance* ^a.

These pleas are twofold, in abatement and in bar ^b. If any thing happen, pending the writ, to abate it, this may be pleaded *puis*

^v *Pearson v. Parkins*, H. 497. for the time to which
3 Geo. I. Bul. Ni. Pri. the plea is continued.

310.

^a Bul. Ni. Pri. 309.

^z Bul. Ni. Pri. 310. and ^b Gilb. C. P. 105. Aleyn,
see Dyer, 361. 1 Blac. Rep. 66.

darrein continuance, though there be a plea in bar; for this only waives all pleas in abatement, that were in being at the time of the bar pleaded, and not subsequent matter: but though it be pleaded in abatement, yet, after a former bar pleaded, it is peremptory, as well on demurrer as on trial; because, after pleading in bar, the defendant has answered in chief, and therefore can never have judgment to answer over^c. After a plea in bar, if the defendant plead a plea *puis darrein continuance*, this is a waiver of his bar, and no advantage shall afterwards be taken of it^d.

The great requisite of these pleas is *certainty*^e; and it is not good pleading to say, generally, that *after the last continuance* such a thing happened, but the time and place must be precisely alledged^f. The form of the plea, if at the assizes, is as follows: *And now at this day, that is to say, on &c. comes the said C. D. by S. S. his counsel, and says (if in bar) that the said A. B. ought not further to maintain this action against him the said C. D. because he says, that after the — day of — last past, from which day*

^c *Id. ibid.* Freem. 252.

1143. 2 Salk. 519. 2 Wils.

^d 1 Salk. 178.

139.

^e Yelv. 141. Cro. Jac.

^f Bul. Ni. Pri. 309

261. Freem. 112. 2 Lutw.

until the — day of — in — term next, (unless the justices of our lord the king, assigned to hold the assizes of our lord the king, in and for the county of — should first come on the — day of — at — in the said county of —) the action aforesaid is continued, to wit, on *Et c.* at *Et c.* the said A. B. by his deed dated *Et c.* did release *Et c.*; and so shew the particular matter^g. In *abatement*, the plea concludes, by praying judgment of the writ, and that the same may be quashed^h; or if the writ is abated *de facto*, by praying judgment if the court will further proceedⁱ: In *bar*, the conclusion of the plea is, that the plaintiff ought not further to maintain his action, and not, that the former inquest should not be taken; because it is a substantive bar in itself, and comes in place of the former, and therefore must be pleaded to the action^j.

There are likewise some pleas, which may be pleaded at *nisi prius*, that cannot properly be termed pleas *puis darrein continuance*, because the matter pleaded need not be ex-

^g Bul. Ni. Pri. 310.

311.

^h Gilb. C. P. 105. 2
Lutw. 1143.

^j Cro. Eliz. 49. 2 Lutw.
1143. Bul. Ni. Pri. 310.

ⁱ 3 Lev. 120. Bul. Ni. Pri. but see Dyer, 361. *in marg.*

pressly mentioned to have happened after the last continuance; as in *trespass*, that the plaintiff was outlawed for felony^k: So the defendant may plead, that the plaintiff was *covert* on the day of the writ purchased; but he cannot plead, that the plaintiff took *baron*, pending the writ, without pleading it after the last continuance: the diversity seems to be, between such things as disprove the writ in fact, and such as disprove it in law^l.

Pleas after the last continuance, being productive of delay, are subject to the same sort of restraints as pleas in abatement: They must be verified on oath, before they are allowed^m; and they cannot be amended, after the assizes are overⁿ: There can be but one plea *puis darrein continuance*^o; and such a plea cannot be pleaded, after a demurrer^p. But if a plea *puis darrein continuance* be filed, and verified on oath, the court cannot set it

^k Thel. Dig. 204.

Bul. Ni. Pri. 309.

^l Bro. Abr. Tit. *Continuance*, pl. 57. Bul. Ni. Pri. 310.

^o Bro. Abr. Tit. *Continuance*, pl. 5, 41. Jenk. 160. Glib. C. P. 105.

^m Freem. 252. 1 Str. 493.

^p 1 Str. 493. cites Mo. 871. but see Hob. 81.

ⁿ Yelv. 181. Freem. 252. *contra*.

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aside on motion, but are bound to receive it ².

When a plea *puis darrein continuance* is put in at the assizes, the plaintiff is not to reply to it there; for the judge has no power to accept of a replication, nor to try it, but ought to return the plea, as parcel of the record of *nisi prius* ¹; and if the plaintiff demur, it cannot be argued there ³. Where a plea is certified on the back of the *possea*, and the plaintiff demurs, if the defendant, on the expiration of a rule given for him to join in demurrer, refuses to do so, the plaintiff may sign judgment ⁴.

Previous to swearing the jury, the plaintiff may withdraw the record, and by that means prevent the cause from being tried. But otherwise the trial proceeds: and as the jury are called, they may be challenged.

¹ 2 Wils. ¹³⁷. 3 T. R. *darrein continuance* was set aside, because the matter of it arose before the last continuance.
² Yelv. 180. Cro. Jac. 261. S. C. Freem. 252. 2 Mod. 307. S. C.
³ 2 Mod. 307.
⁴ Freem. 252. Bul. Ni. Pri. 311.

Challenges

Challenges are of two sorts; first, to the *array*; and secondly, to the *polls*. Challenges to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return; and they may be made upon account of partiality, or some default in the sheriff, or his under-officer who arrayed the panel. And, generally speaking, the same reasons that before awarding the *venire*, were sufficient to have directed it to the coroners or elisors, will be also sufficient to quash the array, when made by an officer, of whose partiality there is any good ground of suspicion. Also, tho' there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is good cause of challenge to the array.

Challenges to the polls, *in capita*, are exceptions to particular jurors; and, according to Sir *Edward Coke* ^a, they are of four kinds; first, *propter honoris respectum*, as if a lord of parliament be impanelled on a jury, in which case he may challenge himself, or be challenged by either party. Secondly, *propter defectum*, as if a jurymen be an alien born, or

^a 1 Inst. 156.

a slave

a slave or bondman; so if he be not resident in the county, or have not the necessary qualification of estate. All incapable persons, as infants, ideots, and persons of *non-sane* memory, are likewise excluded upon this ground^v. Thirdly, *propter affectum*, as that a juror is of kin to either party within the ninth degree^w, that he has been arbitrator, or declared his opinion on either side, that he has an interest in the cause^x, that there is an action depending between him and the party, that he has taken money for his verdict, or even eat and drank at either party's expence, that he has formerly been a juror in the same cause, that he is the party's master, servant, tenant^y, counsellor, steward or attorney, or of the same society or corporation with him. All these are principal causes of challenge: besides which, there are challenges to the *favour*, where the party objects only on account of some probable grounds of suspicion, as acquaintance, and the like; the validity of which must be left to the determination of *triers*, who, in case the first man called be challenged, are two indifferent persons named by the court; and, if they try one man and find him

^v Gilb. C. P. 95.^w Finch. L. 421.^x 3 Bur. 1856.^y Gilb. C. P. 95.

indifferent,

indifferent, he shall be sworn; and then he and the two triers shall try the next; and, when another is found indifferent and sworn, the two triers shall be superseded, and the two first sworn on the jury shall try the rest². Fourthly, jurors may be challenged *propter delictum*, as for a conviction of treason, felony, perjury, or conspiracy; or if, for some infamous offence, he has received judgment of the pillory, tumbrel or the like, or to be branded, whipped, or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, *præmunire*, or forgery. A juror may himself be examined on his *voir dire*, with regard to such causes of challenge, as are not to his dishonor or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage³.

By the *balloting* act, we may remember, the names and additions of the jurors are to be written on pieces of parchment or paper, of equal size, and delivered to the marshal, by the under-sheriff or his agent; and are to be rolled up, by the direction and care of the

² Co. Lit. 158.

C. P. c. 8. Bac. Abr. tit.

³ For more of *challenges*, *Juries*, (E). 3 Blac. Com. see Co. Lit. 156, &c. Gilb. 358, &c.

marshal,

marshal, all as near as may be in the same manner, and put together in a box or glass, to be provided for the purpose ^b. And by the same act ^c, “ when any cause shall be brought
 “ on to be tried, some indifferent person, by
 “ direction of the court, may and shall, in
 “ open court, draw out twelve of the said
 “ parchments or papers, one after another;
 “ and if any of the persons whose names shall
 “ be so drawn, shall not appear, or be chal-
 “ lenged and set aside, then such further num-
 “ ber, until twelve persons be drawn who shall
 “ appear, and, after all causes of challenge,
 “ shall be allowed as fair and indifferent; and
 “ the said twelve persons so first drawn and
 “ appearing, and approved as indifferent, their
 “ names being marked in the panel, and they
 “ being sworn, shall be the jury to try the said
 “ cause; and the names of the persons so
 “ drawn and sworn, shall be kept apart by
 “ themselves, in some other box or glass to
 “ be kept for that purpose, till such jury shall
 “ have given in their verdict, and the same is
 “ recorded, or until such jury shall, by con-
 “ sent of the parties, or leave of the court, be
 “ discharged; and then the same names shall
 “ be rolled up again, and returned to the for-

^b *Ante*, 513, 14.

^c 3 Geo. II. c. 25. § 11.

“ mer

“mer box or glass, there to be kept, with
 “the other names remaining at that time un-
 “drawn, and so *toties quoties*, as long as any
 “cause remains then to be tried.”

Where a *view* is allowed in any cause, it is provided by the same statute^d, that the jurors who took the view, or such of them as shall appear, shall be first sworn upon the jury to try the cause, before any drawing as aforesaid; and so many only shall be drawn, to be added to the viewers who appear, as shall, after all defaulters and challenges allowed, make up the number of twelve, to be sworn for the trial of the cause.

At common law, if a sufficient number of jurymen did not appear at the trial, or so many of them were challenged and set aside, as that the remainder would not make up a full jury, there issued a writ to the sheriff, of *undecim*, *decem*, or *octo tales*, according to the number that was deficient, in order to compleat the jury^e: and this is still necessary, on trials at bar^f. But now, by the statute 35 Hen. VIII. c. 6. § 6, 7, 8. (extended to *quittam* actions, by the 4 & 5 Ph. & M. c. 7.)

^d § 14.

^f 5 T. R. 457, 8, 462.

^e Gilb. C. P. 73.

“the

“ the justices of assize or *nisi prius*, upon re-
“ quest made by the plaintiff or defendant,
“ are authorized to command the sheriff, or
“ other minister to whom the making of the
“ return shall appertain, to name and appoint,
“ as often as need shall require, so many of
“ such other able persons of the said county,
“ then present at the said assizes or *nisi prius*,
“ as shall make up a full jury; which persons
“ shall be added to the former panel, and their
“ names annexed to the same; and that the
“ parties shall have their challenges to the
“ jurors so named, added and annexed to the
“ said former panel, as if they had been im-
“ panelled upon the *venire facias*; and that
“ the said justices shall and may proceed to
“ the trial of every such issue, with those per-
“ sons that were before impanelled and return-
“ ed, and with those newly added and annex-
“ ed to the said former panel, in such wise
“ as they might or ought to have done, if all
“ the said jurors had been returned upon the
“ writ of *venire facias*; and that every such
“ trial shall be as good and effectual in the
“ law, to all intents and purposes, as if such
“ trial had been had, by twelve of the jurors
“ impanelled and returned upon the writ of
“ *venire facias*.” The qualification of a tales-
man,

man, in point of estate, is only *five pounds per annum*^g. And, by the 7 & 8 W. III. c. 32. § 3. the sheriff is directed to return such persons, to serve upon the *tales*, as shall be returned upon some other panel, and then attending the court. Hence it is usual, to draw their names out of the box; though where it is desired by the gentlemen of the panel who appear, and consented to by the parties, the sheriff may return such other gentlemen as can be procured to attend^h. The plaintiff may avoid a nonsuit, by refusing to pray a *tales*ⁱ: and after a juror has been challenged on the principal panel, he ought not to be sworn as a *talesman*^k.

After the jury are sworn, the cause is opened, and the trial proceeds, unless the parties agree to withdraw a juror; which is frequently done, at the recommendation of the judge, where it is doubtful whether the action will lie; and in such case the consequence is, that each party pays his own costs.

In the progress of the cause, either party, if there be occasion, may tender a bill of exceptions, or demur to the evidence. To un-

^g Stat. 4 & 5 W. & M. c. 24. § 18. ⁱ 1 Str. 707.
^h Bul. Ni. Pri. 305. ^k 1 Str. 640. 2 Ld. Raym. 1410. S. C.
P p derstand

derstand the nature of these proceedings, it should be observed, that in the first stage of that process, under which facts are ascertained, the judge decides, whether the evidence offered conduces to the proof of the fact, which is to be ascertained; and there is an appeal from his judgment, by a bill of exceptions. The admissibility of the evidence being established, the question *how far* it conduces to the proof of the fact, which is to be ascertained, is not for the judge to decide, but for the jury exclusively; with which judges interfere in no case, but where they have in some sort substituted themselves in the place of the jury in *attaint*, upon motions for new trials. When the jury have ascertained the fact, if a question arises whether the fact thus ascertained maintains the issue joined between the parties, or in other words, whether the law arising upon the fact, (the question of law involved in the issue depending upon the true state of the fact) is in favor of one or other of the parties, that question is for the judge to decide. Ordinarily he declares to the jury what the law is upon the fact which they find, and then they compound their verdict of the law and fact thus ascertained. But if the party wishes to withdraw from the jury, the application of the
the

the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence; and the precise operation of that demurrer is, to take from the jury, and to refer to the judge, the application of the law to the fact¹.

A bill of *exceptions* is founded upon some objection, in point of law, to the opinion and direction of the court, upon a trial at bar, or of the judge at *nisi prius*, either on account of admitting improper evidence^m, or rejecting that which is proper, over-ruling a challenge, or refusing a demurrer to evidenceⁿ, &c. In these cases it is enacted, by the statute *Westm. 2. (13 Edw. I.) c. 13.* "that if the party
" write the exception, and pray that the justices may put their seals to it for a testimony, the justices shall put their seals; and if
" one will not, another shall: and if the
" king, on complaint made of the justices,
" cause the record to come before him, and
" the exception be not found in the roll, and
" the party shew the exception written under
" the seal of the justice affixed, the justice
" shall be commanded that he appear at a
" certain day, to confess or deny his seal;

¹ H. Blac. 2 V. 205, 6.

ⁿ Cro. Car. 341. and see

^m 1 Salk. 284.

Show. P. C. 120.

“ and if the justice cannot deny his seal, judgment shall be given, according to the exception, as it may be allowed or disallowed.” This statute extends to trials at bar, as well as those at *nisi prius*; but it has been doubted, whether the statute extends to criminal cases°. If a judge allow the matter to be evidence, but not conclusive, and so refer it to the jury, no bill of exceptions will lie; as if a man produce the probate of a will, to prove the devise of a term for years, and the judge leave it to the jury; because though the evidence be conclusive, yet the jury may hazard an *attaint*, if they please, and the proper way had been, to have demurred to the evidence^p.

The bill of exceptions must be tendered at the trial: for if the party then acquiesce, he waives it, and shall not resort back to his exception, after a verdict against him, when perhaps, if he had stood upon his exception, the other party had more evidence, and need not have put the cause on that point. The statute indeed appoints no time; but the nature and reason of the thing require, that the excep-

° See the cases referred to in 1 Bac. Abr. 325. and Bul. Ni. Pri. 316. ^p T. Raym. 404, 5. T. Jon. 146. S. C.

tion should be reduced to writing, when taken and disallowed, like a special verdict, or demurrer to evidence: not that they need be drawn up in form, but the substance must be reduced to writing, while the thing is transacting, because it is to become a record^a.

On tendering the bill, if the exceptions therein are truly stated, the judges ought to set their seals, in testimony that such exceptions were taken at the trial: but if the bill contain matters false, or untruly stated, or matters wherein the party was not over-ruled, the judges are not obliged to affix their seals; for that would be to command them to attest a falsity^r. If the judges refuse to sign the bill of exceptions, the party grieved may have a writ, grounded upon the statute, commanding them to put their seals, *juxta formam statuti*^s, &c. This writ contains a surmise of an exception taken and over-ruled, and commands the justices, that *if it be so*, they put their seals^t; upon which, if it be returned *quod non ita est*, an action lies for a false return, and thereupon the surmise will be tried, and if found to be so, damages will be given;

^a 1 Salk. 288, 9.

^r Pri. 316.

^s Show. P. C. 120.

^t Reg. Brev. 182.

^s 2 Inst. 427. Bul. Ni.

and upon such recovery, there issues a peremptory writ^u.

When the bill of exceptions is sealed, the truth of the facts contained in it can never afterwards be disputed^v: and it is either tacked to the record, or not. If it be not tacked to the record, it is necessary to set out the whole proceedings; but otherwise a more compendious form is sufficient^w. A writ of error is then brought, to remove the proceedings into the court above; for a bill of exceptions is only to be made use of upon a writ of error: and therefore, where a writ of error will not lie, there can be no bill of exceptions^x. Upon the return of the writ of error, the judge is called upon by writ, either to confess or deny his seal^y; and if he confess it, the proceedings being entered of record, the party assigns error^z: If the judge deny his seal, the plaintiff in the writ of error may take issue thereupon, and prove it by witnesses^a.

^u 2 Inst. 427.

^v Show. P. C. 120.

^w Bul. Ni. Pri. 317.

^x 1 Salk. 284. *Rex v. Inhabitants of Preston*, Bul. Ni. Pri. 316. 1 Blac. Rep. 679.

Cowp. 501. but see 2 Lev. 236.

^y 3 Bur. 1693. 1 Blac. Rep. 556. S. C.

^z 2 Lutw. 905, 6.

^a 2 Inst. 428.

Of Demurrers to Evidence. 581

The judgment on the writ of error, as in other cases, is either that the former judgment be affirmed or reversed. If it be reversed, a *venire de novo* issues; which shall be made returnable in this court, although the judgment was given in the Common Pleas ^b.

A *demurrer* to evidence is a proceeding, by which the judges, whose province it is to answer to all questions of law, are called upon to declare, what the law is upon the facts shewn in evidence, analogous to the demurrer upon facts alledged in pleading^c. The reason for demurring to evidence is, that the jury, if they please, may refuse to find a special verdict, and then the facts never appear on the record^d. And the question upon a demurrer to evidence being, whether the evidence offered be sufficient to maintain the issue, the party, on such demurrer, cannot take advantage of any objection to the pleadings^e. A demurrer to evidence is not allowed in the king's case; and therefore if a doubt arises, upon the effect of the evidence,

^b 3 T. R. 36.

^d *Per Buller, Just. Doug.*

^c H. Blac. 2 V. 205. and 134.

see 3 Salk. 122. 4 Bac. Abr. ^e *Id.* 218.

136.

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the judge must direct the jury to find the matter specially ^f.

If a matter of *record*, or other matter in *writing*, be offered in evidence, to maintain an issue joined between the parties, all the books agree, that the adverse party may insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering the same to join in demurrer, or waive the evidence ^g: and the reason given for it is, that there cannot be any variance of matter in writing ^h. The books also agree, that if *parol* evidence be offered, and the adverse party demurs, he who offers the evidence *may* join in demurrer, if he will. But the language of the old books is very indistinct upon the question, whether the party offering *parol* evidence shall be *obliged* to join in demurrer. In a late case ⁱ, which came before the House of Lords, it was observed, in delivering the opinion of the judges, that *parol* evidence is sometimes certain, and no more admitting of any variance, than a matter in writing; but it is also often loose and indeterminate, often circumstantial.

^f Co. Lit. 72. 5 Co. 104. 104. S. C.

^g H. Blac. 2 V. 206.

ⁱ *Gibson and Johnson v.*

^h Cro. Eliz. 753. 5 Co. *Hunter*, H. Blac. 2 V. 187.

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The reason for obliging the party offering evidence in writing, to join in demurrer, applies to the first sort of parol evidence; but it does not apply to parol evidence that is loose and indeterminate, which may be urged with more or less effect to a jury; and least of all, will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. In such cases however, if the party who demurs will admit the evidence of the fact, which evidence is loose and indeterminate, or, in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this parol evidence, than in a matter in writing; and in such case, the party shall be allowed to demur, and his adversary must join in demurrer. But on a demurrer to *circumstantial* evidence, unless the party demurring will distinctly admit, upon the record, every fact, and every conclusion, which the evidence offered conduces to prove, it is not competent for him to insist upon the jury being discharged from giving a verdict, by demurring to the evidence,

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dence, and obliging the party offering it to join in demurrer ^k: though, if the party offering the evidence consent to waive the objection, and join in demurrer, every fact is to be considered by the court as admitted, which the jury could infer in his favor, from the evidence demurred to ^l: and the court will, if they can, give judgment upon such evidence ^m; but otherwise a *venire de novo* must be awarded ⁿ.

The whole operation of entering the matter upon record, and conducting a demurrer to evidence, is and ought to be under the direction and controul of the court, upon a trial at bar, or of the judge at *nisi prius* ^o; subject however to an appeal, by a bill of exceptions, if the demurrer be refused ^p. And where a demurrer to evidence is admitted, it is usual for the court, or judge, to give orders to the associate, to take a note of the testimony; which is signed by the counsel on both sides, and the demurrer is affixed to the *postea* ^q. Upon a demurrer to evidence, we have seen, the damages may be assessed *conditionally* by the principal jury, before they are dis-

^k *Id. ibid.* and see Aleyn,

ⁿ H. Blac. 2 V. 209.

18. Sty. Rep. 22, 34. S. C.

^o *Id.* 208.

^l Doug. 119.

^p *Id. ibid.* Cro. Car. 341.

^m *Id. ibid.*

^q Bul. Nⁱ. Pri. 313.

charged;

charged; or they may be assessed by another jury, upon a writ of inquiry, after the demurrer is determined^r: and it is said to be the most usual course, when there is a demurrer to evidence, to discharge the jury without further enquiry^s.

The evidence being gone through, and summed up by the judge, the jury, if they think proper, may withdraw from the bar, to deliberate on their verdict. And they are allowed to take with them letters patent, and deeds under seal, and the exemplification of witnesses in Chancery, if dead; but not a writing without seal, unless by consent of parties, nor any evidence but what was shewn to the court^t. If the jury take with them patents, deeds, &c. without leave of the court, or writings not under seal, books, &c. without consent of the parties, it will not avoid the verdict^u; though they be taken by the delivery of the party, for whom the verdict was given: So, though one of the jury shew a writing, which was not given in evidence, to his companions^v. But if the party for whom the

^r *Ante*, 317, 18. *Plowd.*
410. 1 *Ld. Raym.* 60.
Doug. 222.

^s *Cro. Car.* 145.

^t 2 *Rol. Abr.* 686.

^u *Cro. Eliz.* 411.

^v *Id.* 616.

verdict is given, or any for him, deliver to the jury a letter, or other writing, not given in evidence, it will avoid the verdict ^w: And so if they examine witnesses by themselves, though to the same evidence as was given in court ^x. But they may come back into court, to hear the evidence of a thing whereof they are in doubt ^y. The objection in these cases must be returned upon the *postea*, or made parcel of the record; otherwise it will not be a ground for staying judgment, or bringing a writ of error ^z.

When the jury have agreed, they return to the bar: but before they gave their verdict, it was formerly usual to *call* or demand the plaintiff, in order to answer the amercement, to which by the old law he was liable, in case he failed in his suit ^a; and it is now usual to call him, whenever he is unable to make out his case, either by reason of his not adducing any evidence in support of it, or any evidence arising in the proper county. The cases in which it is necessary that the evidence should arise in a particular county, are either where the action is in itself local; or made so by act

^w Co. Lit. 227. b.

^x Cro. Eliz. 411.

^y Rol. Abr. 676.

^z Cro. Eliz. 616. and see

Bul. Ni. Pri. 303.

^a 3 Blac. Com. 376.

of parliament, as in actions upon penal statutes, &c. or where, upon a motion to change or retain the venue, the plaintiff undertakes to give material evidence, in the county where the action was brought^b. And there is this advantage attending a nonsuit; that the plaintiff, though he pays costs, may afterwards bring another action for the same cause, which he cannot do, after a verdict against him.

A nonsuit can only be at the instance of the defendant: and therefore where the cause at *nisi prius* was called on, and jury sworn, but no counsel, attornies, parties or witnesses appeared, on either side, the judge held, that the only way was to discharge the jury; for nobody has a right to demand the plaintiff, but the defendant, and the defendant not demanding him, the judge could not order him to be called^c. In an action against *several* defendants, the plaintiff must be nonsuited as to all, or none of them; and therefore, if one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited as to him; but such defendant must have a verdict, if the plaintiff fail to make out his case^d.

^b 2 Blac. Rep. 1039.

Str. 1117.

^c 1 Str. 267. see also 2

^d 3 T. R. 662.

The plaintiff in no case is compellable to be nonsuited; and therefore, if he insist upon the matter being left to the jury, they must give in their *verdict*, which is general or special. A *general* verdict is a finding by the jury, in the terms of the issue, or issues referred to them; and it is either, wholly or in part, for the plaintiff, or for the defendant. If it be for the plaintiff, or for the defendant in *replevin*, the jury should regularly assess the damages: but when the plaintiff is nonsuited on the trial of an issue, he cannot have *contingent* damages, assessed for him on a demurrer^e; though, when the plaintiff in *replevin* is nonsuited, the jury may assess damages for the defendant^f.

Damages are a pecuniary compensation for an injury; and may be recovered in every *personal* action that lies at common law, and also in every *mixed* action^g; but in an action for a penalty given by statute to a common informer, they are not recoverable^h, nor in a *scire facias* founded on the statute of *Westm.* 2. c. 45. for delay of executionⁱ. In actions upon the *case*, *trespass*, *replevin*, &c. the da-

^e 1 Str. 507.^h 1 Rol. Abr. 574. 4 Bur.ⁱ Comb. 11. 5 Mod. 76. 2018, 2489.^f 2 Inst. 286.^g 3 Bur. 1791.

gages

mages at common law are *single*, and proportioned to the injury complained of; but *double* or *treble* damages are sometimes given by statute, in cases where *single* damages were before recoverable, as upon the 2 *Hen.* IV. c. 11. for wrongfully suing in the admiralty court^k, upon the 8 *Hen.* VI. c. 9. for a forcible entry^l, upon the 43 *Eliz.* c. 2. in actions against overseers of the poor^m, and upon the 2 & 3 *W. & M.* sess. 1. c. 5. for rescuing a distress for rentⁿ.

In an action of *debt*, for a penalty, the damages at common law are merely *nominal*, unless where they exceed the penalty^o: But where an action is brought upon a bond, for the non-performance of covenants, the jury, upon the trial or a writ of inquiry, are, by virtue of the statute 8 & 9 *W.* III. c. 11. § 8. to assess not only the ordinary damages and costs of suit, but also damages for such of the breaches as the plaintiff proves; and judgment shall be entered

^k 10 Co. 116. Dyer, 159.

^m Say. Rep. 214.

b. Carth. 297.

ⁿ Carth. 321. 1 Salk.

^l Bro. *Dam. pl.* 70. 10 205. 1 *Ld. Raym.* 19, 342.

Co. 115. b. Co. Lit. 257. Skin. 555. Holt, 172.

b. 2 Inst. 289. Cro. Eliz. S. C.

582.

^o 2 T. R. 383.

in the common form, which shall afterwards remain as a security to the plaintiff, against future breaches.

On a declaration consisting of several counts, the jury may either assess *intire* damages, on the whole or part of the declaration, or they may assess *several* damages on the different counts^p. If *intire* damages be assessed, and any one or more of the counts be bad or inconsistent, judgment may be arrested^q; because it must be intended, that some part of the damages was assessed upon those counts. In order to cure this defect, if there was evidence given at the trial upon such of the counts only as are good and consistent, a general verdict may be altered, from the notes of the judge, and entered only on those counts; but if there was any evidence, which applied to the other bad or inconsistent counts, (as for instance in an action for *words*, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict), there the *postea* cannot be amended; because it would be impossible for the judge to say, on which of the counts the jury had found the damages, or

^p 1 Rol. Abr. 570. pl. 1. ^q Say. Dam. ch. 25.

how they had apportioned them: in such case therefore, the only remedy is by awarding a *venire de novo*^r. If the jury find a verdict for the plaintiff with one penalty, generally, in a penal action, and the plaintiff apply it to one count, he cannot afterwards apply it to another, though the former is bad in law, and though the evidence would have warranted the verdict on any other count^s.

If there be judgment by default as to part, and an issue upon other part, or, in an action against several defendants, if some of them let judgment go by default, and others plead to issue, there ought to be a special *venire*, as well to try the issue as to inquire of the damages, *tam ad triandum quam ad inquirendum*, and the jury who try the issue shall assess the damages for the whole, or against all the defendants^r. In these cases, when the defendants who plead to issue are acquitted at the trial, the jury, in some instances, shall assess damages against the defendants who let judgment go by default, and in others not. In actions upon *contract*, as *covenant*^u, *assumpsit*^v, &c. the

^r Doug. 376, 722. 1 T. R. 542.

^u 1 Lev. 63. 1 Sid. 76. 1 Keb. 284. S. C.

^s 3 T. R. 448. but see 3 Bur. 1237. *semb. contra*.

^v Caf. Pr. C. B. 107. Prac. Reg. 102. S. C.

111 Co. 5.

3 T. R. 662.

plea of one defendant, for the most part, enures to the benefit of all; for the contract being intire, the plaintiff must succeed upon it against all or none; and therefore, if the plaintiff fail at the trial, upon the plea of one of the defendants, he cannot have judgment or damages against the others, who let judgment go by default. But in actions of *tort*, as *trespass*, &c. where the wrong is joint and several, the distinction seems to be this, that where the plea of one of the defendants is such, as shews the plaintiff could have no cause of action against any of them, there, if this plea be found against the plaintiff, it shall operate to the benefit of all the defendants, and the plaintiff cannot have judgment or damages against those who let judgment go by default^w; but where the plea merely operates in discharge of the party pleading it, there it shall not operate to the benefit of the other defendants, but notwithstanding such plea be found against the plaintiff, he may have judgment and damages against the other defendants^x.

If there be a *demurrer* to part, and an issue upon other part, or, in an action against several defendants, if some of them demur,

^w 2 Ld. Raym. 1372. 1 S. C.

Str. 610. 8 Mod. 217. ^x 2 Str. 1108, 1222.

and

and others plead to issue, the jury who try the issue shall assess the damages for the whole, or against all the defendants. In this case, if the issue be tried before the demurrer is argued, the damages are said to be *contingent*, depending upon the event of the demurrer. But where the issue, as well as the demurrer, goes to the whole cause of action, the damages shall be assessed upon the issue, and not upon the demurrer.

Where there are several defendants, who sever in pleading, the jury who try the first issue shall assess damages against all, with a *cesset executio*; and the other defendants, if found guilty, shall be contributory to those damages^y. In *trespafs* against several defendants, who join in pleading, if the jury on the trial find them all jointly guilty, they cannot assess several damages^z. But they may find some of them guilty, and acquit others; in which case, the damages can be assessed against those only who are found guilty: or they may find some of the defendants guilty of the whole trespass, and others of part only^a, or some of

^y 11 Co. 5.

⁵ Bur. 2792.

^z Cro. Eliz. 860. 11 Co.

^a Cro. Eliz. 860. 11 Co.

5. 1 Str. 422. 2 Str. 910. 5. Sty. Rep. 5.

them guilty of part, or at one time, and the rest guilty of other part, or at another time ^b; in either of which cases, they may assess several damages. And where in an action against several defendants, the jury by mistake have assessed several damages; the plaintiff may cure it, by entering a *nolle prosequi* as to one of the defendants, and taking judgment against the others ^c; or he may enter a *remittitur* as to the lesser damages ^d; or, even without entering a *remittitur*, he may take judgment against all the defendants, for the greater damages ^d.

Where the jury, upon the trial of an issue, have omitted to assess the damages, we have before seen in what cases the omission may be supplied, by a writ of inquiry ^e. Where the jury give greater damages than the plaintiff has declared for, it may be cured by entering a *remittitur* of the surplus, before judgment ^f. And in an action for a *mayhem*, the damages may be increased by the court, on view of the party ^g.

^b 11 Co. 6. Brownl. 233.

^c *Ante*, 316, &c.

Cro. Car. 54.

^f Yelv. 45. 2 Str. 1110.

^e 11 Co. 5. Cro. Car. 1171.

239, 243. Carth. 19.

^g 1 Ld. Raym. 176. 3

^d 11 Co. 7. a. Cro. Car. Salk. 115. S. C. 1 Will. 5.

192. 1 Will. 30.

Barnes, 153.

On a general verdict, the jury were liable to be attainted, if they gave a false verdict^h. To relieve them from this difficulty, it was enacted, by the statute of *Westm. 2.* (13 *Edw. 1.*) c. 30. § 2. "That the justices of assize shall not compel the jurors to say precisely whether it be disseisin or not, so as they state the truth of the fact, and pray the aid of the justices; but if they will say, of their own accord, that it is disseisin, their verdict shall be admitted at their own peril." Upon this statute, it has become the practice for the jury, when they have any doubt as to the matter of law, to find a *special* verdict, stating the facts, and referring the law arising thereon to the decision of the court; by concluding conditionally, that if upon the whole matter alleged, the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendantⁱ. In finding special verdicts, where the points are single and not complicated, and no special conclusion, the counsel (if required) are to subscribe the points in question, and agree to amend omissions or mistakes in the mesne conveyance, according to the truth, to

^h Gilb. C. P. 171.

ⁱ 3 Blac. Com. 377, 8.

bring the point in question to judgment^k. And unnecessary finding of deeds *in hac verba*, where the question rests not upon them, but are only derivation of title, ought to be spared, or found shortly, according to the substance they bear in reference to the deed, as feoffment, lease, grant^l, &c. It is also a general rule, that in a special verdict, the jury must find facts, and not merely the evidence of facts^m: And if in this, or any other particular, the verdict be defective, so that the court are not able to give judgment thereon, they will amend it, if possible, by the notes of counsel, or even by an affidavit of what was proved upon the trialⁿ; or otherwise, they will supply the defect, by awarding a *venire de novo*^o.

If there be a special verdict, the plaintiff's attorney generally gets it drawn, from the minutes taken at the trial, and settled by his counsel, who signs the draft. It is then delivered over to the opposite attorney, who gets his counsel to peruse and sign it; and when the verdict is thus settled and signed, it is left

^k R. M. 1654. § 20.

ⁿ *Ante*, 455.

^l *Id. ibid.*

^o 2 Ld. Raym. 1521,

^m 1 Will. 48. 2 Str. 1185. 1584. 2 Str. 887. S. C. S. C. 1124. S. P.

with

with the clerk of *nisi prius* in a town cause, or with the associate in the country, who makes copies for each party ^p. The whole proceedings are then entered, docketed, and filed of record; after which a *concilium* is moved for, a rule drawn up thereon with the clerk of the rules, the cause entered with the clerk of the papers, copies of the record made and delivered to the judges, and counsel instructed and heard, in like manner as upon arguing a demurrer ^p; only that a special verdict must be set down in the paper for argument, within four days ^q, and cannot be set down afterwards without leave of the court ^r. After judgment given, the prevailing party is immediately entitled to tax his costs, and take out execution, without giving a four-day rule for judgment; but the other party may have a rule to be present at taxing costs ^s.

Another method of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the court above, on a *special* case, stated by the counsel on both sides, with regard to a matter of law: which has this advantage over a special verdict, that

^p Imp. K. B. 352.

^r Imp. K. B. 352.

^s Bur. in pref. IV.

^q *Id. ibid.*

it is attended with much less expence, and obtains a much speedier decision; the *postea* being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant, as the case may happen. But, as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court upon the point of law ^t.

In a special case, as in a special verdict, the facts proved at the trial ought to be stated, and not merely the evidence of facts ^u. It is usually dictated by the court, and signed by the counsel, before the jury are discharged; and if in settling it, any difference arises about a fact, the opinion of the jury is taken, and the fact stated accordingly ^v. For the argument of a special case, the same steps must be taken, as for that of a special verdict, except that it is not entered of record ^w. In arguing it, the counsel are not permitted to go out of the case, and the court must judge upon it as stated ^x: If it be mis-stated, the parties must

^t 3 Blac. Com. 378.

^w Imp. K. B. 353.

^u 2 Will. 163.

^x 1 Bur. 617.

^v 1 Bur. in pref. IV.

apply

apply to amend; or if it be so defective, that the court are not able to give judgment, they will grant a new trial, in order to have it re-stated ¹.

Upon trial of the issue, a case was made, and afterwards argued in court, but the fact not being sufficiently stated, so as the court could give judgment according to the justice of the cause, it was recommended to the parties, and accordingly they agreed, to go to a new trial; where the plaintiff was nonsuited. And the question being about the costs, whether the master should tax the common costs of a nonsuit, or take into his consideration all the former proceedings; upon motion for the court's direction to the master, it was ordered, that he should tax the defendant his costs upon the whole, as well with relation to the first trial as the last ². From the statement of this case, it does not appear whether, upon granting a new trial, any thing was said about the costs of the former trial, or whether they were directed to abide the event of the suit: If they were not, it seems, from a subsequent case ³, that at this day they would not have been allowed.

¹ 1 Str. 300. 3 T. R. 507. ² 3 T. R. 507.

³ 1 Str. 300.

The verdict, nonsuit, or whatever else passes at the trial, is entered on the back of the record of *nisi prius*; which entry, from the *Latin* word it began with, is called the *postea*. When the cause is tried at the sittings in *London* or *Middlesex*, the associate delivers the record to the party for whom the verdict is given, and he afterwards indorses the *postea* from the associate's minutes, on the panel; but when the cause is tried at the *assizes*, the associate keeps the record till the next term, and then delivers it, with the *postea* indorsed thereon, to the party obtaining the verdict ^b. On a motion for a new trial, the *postea* was brought into court, and after the new trial had been denied, the *postea* could not be found; the court on debate ordered a new one to be made out, from the record above, and the associate's notes ^c. If the *postea* be wrong, it may be amended by the plea-roll, by the memory or notes of the judge, or by the notes of the associate or clerk of assize ^d.

^b Imp. K. B. 347.

^d *Ante*, 455.

^c 2 Str. 1264.

C H A P. XXXIX.

Of New Trials, and Arrest of Judgment, &c.

AFTER verdict, or upon a writ of inquiry, either on demurrer or judgment by default^a, it is incumbent on the prevailing party to enter a rule for judgment *nisi causa*, on the *postea* or inquisition, with the clerk of the rules. This rule expires in four days^b *exclusive* after it is entered; and *Sunday*^c, or any other day on which the court doth not sit, is not reckoned one of the four days, unless the rule be entered on the last day of the term, or within four days after; during which four days, it is the practice to enter these rules, as of the last day of the term: and at the expiration of four days exclusive after entering such rule, if no sufficient cause be shewn to the contrary, judgment may be entered^d. The rule for judgment ought not to be entered before the day in bank; and it is

^a 1 Salk. 399.^c 4 Bur. 2130.^b 3 Salk. 215. 6 Mod.^d R. E. 5 Geo. II. reg.

241.

3. (a).

not necessary if the plaintiff be nonsuited, for in that case judgment may be entered immediately after the day in bank ^c.

Within the time limited by the rule, the unsuccessful party may move the court for a new trial or inquiry; or in arrest of judgment; or for judgment *non obstante veredicto*, a repleader, or *venire facias de novo*.

The first instance to be met with in the books, of a new trial on the evidence, was in the case of *Wood and Gunston*, A. D. 1665 ^f. But *Holt* Ch. J. seems to have been of opinion, that they were more ancient, from the challenge to be met with in the old books, that the juror had before given a verdict in the same cause ^g: Yet it does not from thence follow that the court granted a new trial upon the evidence; for it might appear to be a mis-trial upon the record, or there might be other reasons for awarding a *venire facias de novo* ^h.

But whatever might have been the origin of the practice, trials by jury in civil causes could not subsist now, without a power some-

^c R. E. 5 Geo. II. reg.

^g 2 Salk. 648.

^f (a).

^h 2 Str. 995.

ⁱ Sty. Rep. 462, 466.

where to grant new trials. If an erroneous judgment be given in point of law, there are many ways to review and set it right. Where a court judges of facts upon depositions in writing, their sentence or decree may many ways be reviewed and set right. But a general verdict can only be set right by a new trial; which is no more than having the cause more deliberately considered, by another jury, when there is a reasonable doubt, or perhaps a certainty, that justice has not been done. The writ of *attaint* is now a mere sound in every case; in many it does not pretend to be a remedy. There are numberless causes of false verdicts, without corruption or bad intention of the jurors: They may have heard too much of the matter, before the trial; and imbibed prejudices, without knowing it. The cause may be intricate: The examination may be so long, as to distract and confound their attention. Most general verdicts include legal consequences, as well as propositions of fact: In drawing these consequences, the jury may mistake, and infer directly contrary to law. The parties may be surprized, by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. It unjust verdicts,

dicts, obtained under these, and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory ⁱ.

It was not formerly usual to grant a new trial in *ejectment* ^k, or after a trial at bar ^l, nonsuit ^m, or two *concurring* verdicts ⁿ; but for the sake of obtaining justice, it may now be had in these, as well as in other cases ^o. Where there are two *contrary* verdicts, it is not of course to grant a third trial, but the court in their discretion will grant or refuse it, according to circumstances; there being no rule, either at law or in equity, which entitles the losing party in that case to the benefit of a third trial, if the second verdict be satisfactory to the court ^p. In an *inferior* court, a verdict cannot be set aside, and a new trial had,

ⁱ 1 Bur. 393.

^k 2 Salk. 648.

^l 7 Mod. 37, 156. 2 Salk. 650. S. C.

^m 1 Blac. Rep. 532.

ⁿ 6 Mod. 22. 2 Salk. 649. 1 Str. 692.

^o 2 Str. 1105. 4 Bur. 2224. in *Ejectment*; Sty.

Rep. 462, 466. 1 Str. 584.

2 Ld. Raym. 1358. S. C.

2 Str. 1105. 1 Bur. 395.

after a *trial at bar*; 4 Bur.

1986. 2 Blac. Rep. 698.

3 Will. 146, 338. after a

nonsuit; 4 Bur. 2109. after

two *concurring* verdicts.

^p 2 Blac. Rep. 963.

upon

upon the merits; but only for irregularity^a: An inferior court however has power to set aside a regular interlocutory judgment, in order to let in a trial of the merits^r.

The principal grounds or reasons for setting aside a verdict or nonsuit, and granting a new trial, are first, the want of due notice of trial^s: but if the defendant appears and makes defence, he shall not have a new trial on that ground^t. Secondly, the misbehaviour of the prevailing party, towards the jury or witnesses^u: but merely desiring a juror to appear, is no cause for setting aside the verdict^v. Thirdly, the misbehaviour of the jury, in casting lots for their verdict^w, &c.: but the court will not receive an affidavit of misbehaviour from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor^x; nor will they suffer the jury to explain by affidavit the grounds of their verdict, or to shew that they intended some-

^a 2 Salk. 650. 1 Str. 113,

^v 1 Str. 643.

392, 499.

^w 2 Salk. 645. 1 Str. 642.

^r 1 Bur. 571.

Bul. Ni. Pri. 326.

^s Bul. Ni. Pri. 327.

^x Say. Rep. 100. 1 T. R.

^t 2 Salk. 646.

11.

^u 7 Mod. 156.

thing

thing different from what they found^y. Fourthly, the court will sometimes, though rarely, grant a new trial, on account of the unavoidable absence of the attornies or witnesses^z, or upon the discovery of new and material evidence, since the trial^a: but a new trial is never granted for the default or omission of the parties, their counsel or attornies, in not coming prepared with, or going into evidence, which they were apprised of, and might have produced, at the former trial^b; or because a witness has either from inattention, or the want of being prepared, made a mistake in giving his evidence^c; or on account of an objection to the competency of witnesses, discovered after the trial^d. Fifthly, the misdirection of the judge is a good ground for a new trial^e, or his admitting or refusing evidence contrary to law^f. Sixthly, a new trial may be, and is commonly, moved for

^y 5 Bur. 2667. 2 Blac. Will. 98. 1 Blac. Rep. 298.
Rep. 803. 2 T. R. 281. 2 Blac. Rep. 802, 3. 1 T.
but see 1 Bur. 383. *semb.* R. 84. 2 T. R. 115.

contra.

^c Say. Rep. 27.

^z 2 Salk. 645. 6 Mod.
22.

^d 1 T. R. 717.

^e 2 Salk. 649. 2 Will.

^a 2 Blac. Rep. 955.

273.

^b 2 Salk. 647, 653. 6
Mod. 22. 1 Str. 691. 1

^f 6 Mod. 242.

on account of the error or mistake of the jury, in finding a verdict without, or contrary to evidence^g: but where there is evidence on both sides, it is not usual to grant a new trial^h, unless the evidence for the prevailing party be very slight, and the judge declare himself dissatisfied with the verdictⁱ. And it is a general rule, not to grant a new trial, except for the misdirection of the judge^k, in a penal^l, hard, or trifling action^m, after a verdict for the defendant; nor, after a verdict for the plaintiff, where the defence is unconscionableⁿ, and the verdict is found according to the justice and honesty of the case^o. Seventhly, a new trial may be had for *excessive* damages^p; but in that case, the damages must be such, as appear at first blush to be

- ^g 1 Bur. 12, 54. 2 Bur. Cowp. 37.
 665, 936. ⁿ 2 Salk. 644, 646, 7.
^h 2 Str. 1106, 1142. 1 1 Bur. 12, 54. 2 Bur. 664.
 Willf. 22. 4 T. R. 408.
ⁱ Say. Rep. 264. and see ^o 2 Bur. 936. 2 Willf.
 3 Willf. 38, 9. 306. 2 T. R. 4.
^k 4 T. R. 753. 5 T. R. ^p 1 Str. 692. 1 Bur. 609.
 19. 2 Willf. 160, 205, 244,
^l 2 Str. 899, 1238. 1 252, 405. 3 Willf. 62. 2
 Willf. 17. 3 Willf. 59. Blac. Rep. 929, 942, 1327.
^m 2 Salk. 644, 648, 653. Cowp. 230. 1 T. R. 277.
 1 Bur. 12, 54, 664. 3 Bur. 5 T. R. 257.
 1306. 2 Blac. Rep. 851.

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outrageous,

outrageous, and indicate passion or partiality in the jury: and it is not usual to grant a new trial for *smallness* of damages^a; though inquiries, on writs of inquiry, have been frequently set aside on that ground^r.

A new trial cannot be granted, at the instance of *one* of several defendants^s, nor for a *part* only of the cause of action^t; and therefore, where one issue out of four was found against evidence, the court granted a new trial, not only as to such issue, for that they said cannot be, but for the whole^u. But then, the issue found against evidence must be a material one; for if, out of three issues, two are found against evidence, yet if the material issue in the cause be agreeable to evidence, the court will not grant a new trial^v.

The motion for a new trial must be made, within four days *exclusive* after the entry of a rule for judgment^w; and if it be not made within that time, the party complaining cannot af-

^a 2 Salk. 647. 2 Str. Rep. 298. S. C.

940, 1051.

^u *Rex v. Pool*, E. 1734.

^r 1 Str. 425, 515. 2 Str. Bul. Ni. Pri. 326.

1259.

^v *Dexter v. Barrowby*, E.

^s 12 Mod. 275. 2 Str. 25 Geo. II. Bul. Ni. Pri.

814.

326.

^t 2 Bur. 1224. 1 Blac. ^w Doug. 171.

terwards

terwards be heard, on the subject of a new trial^x: and there is no difference in this respect between civil and criminal cases^y; though, in the latter, where the court have seen of themselves, or it has appeared to them on the suggestion of counsel, that substantial justice has not been done, they have sometimes interposed, after the regular time, and granted a new trial^z. It is a general rule, that the party shall not move for a new trial, after he has moved in arrest of judgment^a: This rule however extends only to cases, where the party has knowledge of the fact, at the time of moving in arrest of judgment; therefore a new trial was granted, after such a motion, on affidavits of two of the jury, that they drew lots for their verdict^b.

An affidavit is necessary to move for a new trial, unless the ground of it appears on the face of the evidence: and the rule, if granted, is a rule to shew cause; on obtaining which, application should be made to the judge who tried the cause, for his report of

^x 5 T. R. 436.

^a 2 Salk. 647. 1 Bur. 334.

^y *Id. ibid.*

^b Bul. Ni. Pri. 325, 6.

^z 2 Str. 845, 995. 2 Bur. 1189. Doug. 797. 5 T. R. 436, 7. but *Qu.* whether such affidavits would now be received. *Ante*, 605.

the evidence, and if he be not of the same court, his clerk will deliver it to the *puisne* judge of the court in which the action is brought ^c. If the judge who tried the cause declare himself satisfied with the verdict, it hath been usual, not to grant a new trial, on account of its being against evidence: on the other hand, if he declare himself dissatisfied with the verdict, it is pretty much of course to grant it ^d. In a case where a judge only reported evidence, without declaring himself to be satisfied or dissatisfied with the verdict, the court were under difficulty how to act: they seemed inclined however to hear it spoken to; but, through their interposition, the parties agreed to abide by the determination of the point of law ^e.

The granting of a new trial is either without, or upon payment of the costs of the former trial, or such costs are directed to abide the event of the suit, or nothing is said respecting them. If a new trial be granted for irregularity, the costs of the former trial ought not to be paid ^f; and the party applying is, in such case, entitled to the costs of the

^c Imp. K. B. 360.

II. Bul. Ni. Pri. 327.

^d Bul. Ni. Pri. 327.

^f 12 Mod. 370.

^e Rex v. Phillips, 23 Geo.

appli-

application. Where the plaintiff has been nonsuited, by the mistake of the judge in point of law, the court have, in several instances, ordered the nonsuit to be set aside without costs ^g: and verdicts have been set aside, in a similar manner, when they have been obtained by unfair practice ^h, or contrary to law and the judge's direction ⁱ. But generally speaking, where a new trial is granted for the error or mistake of the jury, either in finding a verdict without or contrary to evidence, or in giving excessive damages, it is always upon payment of the costs of the former trial ^k. On granting a new trial for the misbehaviour of the jury, the costs of the former trial were directed to abide the event of the suit ^l. Where the costs of the former trial are not ordered to be paid, nor directed to abide the event of the suit, each party must pay his own, and the party ultimately succeeding is not entitled to them ^m.

^g 1 Blac. Rep. 670. Say.

Costs, 189. 3 Will. 338.

^h 1 Bur. 352.

ⁱ Say. Costs, 189. 2 Bur.

1224. 1 Blac. Rep. 298.

S. C. 1 Blac. Rep. 670.

S. P.

^k 12 Mod. 370. 1 Str.

642. 1 Bur. 12, 393. 2 Bur.

665. K. B. Pr. Reg. 408.

C. B.

^l 1 Str. 642.

^m Doug. 437. 3 T. R.

507. S. P. but see 1 Str.

300. *semb. contra.*

612 Of Arrest of Judgment, &c.

If the verdict or nonsuit be set aside, and a new trial granted, the rule for that purpose should be drawn up and served; and if it be on payment of costs, they must be forthwith paid, the rule being conditional, or the prevailing party may move the court for leave to enter up judgment, and take out execution. In order to proceed to a new trial, it is not necessary that the *nisi prius* record should be engrossed afresh, unless the *postea* be indorsed on it, or that any new entries should be made or paid for; but the record must be passed again, with an alteration of the *jurata*; and notice of trial being given, another *venire* and *distringas* must be sued out and returned, and the cause set down anewⁿ.

The only ground of arresting the judgment, at this day, is some matter *intrinsic*, appearing upon the face of the record, which would render it erroneous and reversible; for though it seems to have been otherwise formerly^o, yet it is now settled, that judgment cannot be arrested, for *extrinsic* or foreign matter, not appearing on the face of the record, but the court are to judge upon the

ⁿ Imp. K. B. 361.

^o 1 Salk. 77.

record itself, that their successors may know the grounds of their judgment^p. The old course of taking advantage in arrest of judgment was thus; the party after a general verdict, having a day in court, (for so he has as to matters of law, though not of fact,) did assign his exceptions in arrest of judgment, by way of plea, and it was called pleading in arrest of judgment: This differed from moving in arrest of judgment, which was done by one as *amicus curiæ*, where the party was out of court^q. After judgment on *demurrer*, there can be no motion in arrest of judgment, for any exception that might have been taken, on arguing the demurrer; the reason is, that the matter of law having been already settled, by the solemn determination of the court, they will not afterwards suffer any one to come as *amicus curiæ*, and tell them that the judgment which they gave on mature deliberation is wrong: but it is otherwise, after judgment by default, for that is not given in so solemn a manner^r.

The parties cannot move in arrest of judgment, for any thing that is aided, after

^p 1 *Ld. Raym.* 232. 4 ^q 1 *Salk.* 77, 8. 6 *Mod.*
Bur. 2287. 143.

^r 1 *Str.* 425.

verdict, at common law; or amendable at common law, or by the statutes of amendments; or cured, as matter of form, by the statutes of Jeofails.

At common law, where any thing is omitted in the declaration, though it be matter of substance, if it be such as, without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment*. This rule however is to be understood with some limitation; for on looking into the cases, it appears to be, that where the plaintiff has stated his title, or ground of action, defectively or inaccurately, (because, to entitle him to recover, all circumstances necessary, in form or substance, to compleat the title so imperfectly stated, must be proved at the trial,) it is a fair presumption, after a verdict, that they were proved; but that where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption†. And hence it is a general rule, that *a verdict will aid a title defectively set out,*

* 2 Show. 233. T. Raym. 1214. 1 Will. 1, 255. 487. S. C. and see Hob. 78. Bur. 2020. Cowp. 825. Carth. 304. 2 Ld. Raym. † Doug. 679.

but

but not a defective title ^v. Thus, where the grant of a reversion is stated, which cannot take effect without attornment, that, being a necessary ceremony, may be presumed to have been proved ^v. But where, in an action against the *indorser* of a bill of exchange, the plaintiff did not alledge a demand on and refusal by the *acceptor*, when the bill became due, or that the defendant had notice of the acceptor's refusal, this omission was held to be error, and not cured by the verdict ^w: for in this case, it was not requisite for the plaintiff to prove, either the demand on the acceptor, or the notice to the defendant, because they were neither laid in the declaration, nor were they circumstances necessary to any of the facts charged.

Another rule at common law is, that *surplusage* will not vitiate after verdict; *utile per inutile non vitiatur* ^x: and therefore in *trover*, if the plaintiff declare that on the *third* of *March* he was possessed of goods, which came to the defendant's hands; and that afterwards, to wit, on the *first* of *March*, he converted

^v 2 Str. 1011, 1023. Cas. ^w *Id.* 679.
^{temp.} Hardw. 118. S. C. 1 ^x Co. Lit. 303. b.
 Bur. 301. 2 Bur. 1159. Plowd. 232. 1 Saund. 169,
 4 T. R. 472. 287.
^v Doug. 683.

them to his own use, this is cured after verdict, for that he *afterwards* converted them is sufficient, and the *scilicet* is void ^r.

As the plaintiff's action must have all the essentials necessary to maintain it, so the defendant's bar must be substantially good; and if the gift of the bar be bad, it cannot be cured by a verdict found for the defendant: but if it be found for the plaintiff, he shall have judgment, either for the badness or falsity of the bar ^z. Thus, before the statute for the amendment of the law ^a, if the defendant had pleaded payment without an acquittance, and it had been found for him, yet he could not have judgment; because the gift of the plea was bad, since the obligation remained in force, until dissolved *eodem ligamine quo ligatur*; but if it had been found for the plaintiff, he should have had judgment ^b.

Where a plea confesses the action, and does not sufficiently avoid it, judgment shall be given on the confession, without regarding a verdict for the defendant, which is called a

^r Cro. Jac. 428.

^z Gibb. C. P. 140.

^a 4 Ann. c. 16.

^b 5 Co. 43. Cro. Eliz.

455. Moor, 692. S. C. Cro.

Eliz. 778.

judg-

judgment *non obstante veredicto* ^c; and in such case, a writ of inquiry shall issue.

A verdict cannot help an *immaterial* issue; but an *informal* one is aided by the 32 H. 8. c. 30 ^d. An immaterial issue is, where what is materially alledged by the pleadings is not traversed, but an issue taken on such a point, as will not determine the merits of the cause: an informal issue is, where it is not traversed in a proper manner ^e.

Where the issue is immaterial, the court will award a *repleader*; respecting which, the following rules were laid down by the court, in the case of *Staple and Haydon* ^f. First, that at common law a repleader was allowed before trial, because a verdict did not cure an immaterial issue; but now a repleader ought never to be allowed till trial, because the fault of the issue may be helped after verdict, by the statute of Jeofails. Secondly, that if a repleader be denied where it should be granted, or granted where it should be denied, it is error. Thirdly, that the judgment of repleader is general, namely, *quod partes repla-*

^c Carth. 370. 1 Salk.

^d Gilb. C. P. 147.

173. S. C. 6 Mod. 1. 2

^e Cro. Eliz. 227. Carth.

Ld. Raym. 924. S. C. 1 Str.

371. 1 Lev. 32. 2 Mod. 137.

394. 2 Str. 873. 1 Bur. 301.

^f 2 Salk. 579. and see 6 Mod. 1. S. C.

citent;

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citent ; and the parties must begin again at the first fault, which occasioned the immaterial issue : Thus, if the declaration be ill, and the bar and replication are also ill, the parties must begin *de novo* ; but if the bar be good, and the replication ill, at the replication^s. Fourthly, no *costs* are allowed on either side^h. Fifthly, that a repleader cannot be awarded, after a default at *nisi prius*. Lastly, it may be added, that a repleader can never be awarded after a demurrer, or writ of error, but only after issue joinedⁱ.

The distinction between a repleader, and a judgment *non obstante veredicto*, seems to be this ; that where the plea is good in form, though not in fact, or, in other words, if it contain a defective title, or ground of defence, by which it is apparent to the court, upon the defendant's own shewing, that in any way of putting it, he can have no merits, and the issue joined thereon be found for him, there, as the awarding of a repleader could not mend the case, the court, for the sake of the plaintiff, will at once give judgment *non*

^s 3 Keb. 664.

125.

^h 2 Vent. 196. Barnes,

ⁱ 3 Salk. 306.

obstante veredicto ; but where the defect is not so much in the title, as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or defendant, there, for their own sake, they will award a repleader ^k. A judgment therefore *non obstante veredicto* is always upon the merits ; a repleader, upon the form and manner of pleading.

A *venire facias de novo* ^l is grantable, in the following cases ; First, where the jury are improperly chosen, or there is any irregularity in returning them ^m. Secondly, where they have improperly conducted themselves ⁿ. Thirdly, where they give *general* damages, upon a declaration consisting of several counts, and it afterwards appears that one or more of them is defective ^o. Fourthly, where the ver-

j Carth. 370. 1 Salk. ^l For the difference between a *venire de novo* and
173. S. C. 6 Mod. 1. 2 Ld. a new trial, see 1 Will. 55.
Raym. 924. S. C. 1 Str. ^m 2 T. R. 126. *in notis*.
394. 2 Str. 873. 1 Bur. ⁿ *Id. ibid.*
301.

^k 3 Salk. 305. 1 Ld. ^o Doug. 377, 8. and see
Raym. 391. S. C. 2 Str. 1 T. R. 542.
847, 994. 1 Bur. 301.

dict, whether general or special^p, is imperfect, by reason of some uncertainty or ambiguity^q, or by finding less than the whole matter put in issue, or by not assessing damages^r. Fifthly, by the statute 7 & 8 W. 3. c. 32. § 1. if the plaintiff, after issuing jury process, does not proceed to trial at the first assizes: but if the jury be discharged at the assizes, in order to have a view, there is no need of a *venire de novo*^s. Lastly, it is observable, that a *venire de novo* may be granted by a court of error^t; or after a demurrer to evidence^u, or bill of exceptions^v.

The doctrine of *amendments* having been already considered, I shall next proceed to take a short review of the statutes of *Jeofails*, and the decisions thereon, as applicable to different proceedings, in the course of the suit. And first, of the original writ.

^p 2 Ld. Raym. 1521, 1 T. R. 783. 5 T. R. 367.
 1584. 2 Str. 887. S. C. H. Blac. 2 V. 211. but
 1124. S. P. see 2 Str. 1055. *semb. contra.*
^q Same cases. 5 Bur. 2669. ^u Sty. Rep. 34, 335. 5
^r 2 Str. 1052. 2 Willf. T. R. 367. H. Blac.
 367. 2 T. R. 120. *in notis.* 2 V. 211.
^s Com. Rep. 248. ^v 2 T. R. 125. 3 T. R.
^t 2 Str. 1051, 1124. 36.
 Cowp. 89, 91. Doug. 730.

The want of an *original* writ, we have seen^w, is aided after verdict, by the 18 *Eliz.* c. 14. which statute has been extended, by an equitable construction, to the want of a *bill* upon the file^x. This statute also cures the want of form, touching false *Latin*, or variance from the register, or other defaults in form, in any writ original or judicial, &c. But it has been holden, that an original writ which is bad in substance, or a good one which warrants not the declaration, is not aided by the statute^y. Where the original writ, however, is not between the same parties^z, in the same county^a, of the same term^b, or for the same cause of action^c, the court will *primâ facie* intend that it is not the original writ, upon which the action was brought; and where it is certified to be the same, if the defendant in error comes in, upon the *scire facias ad audiendum errores*, and alledges for

^w *Ante*, 14.

^a Cro. Jac. 654, 5. 674.

^x Hob. 130, 134, 264, 281, 304.

Palm. 428. 2 Rol. Rep. 382. but see Cro. Jac. 479.

^y 5 Co. 37. b. Cro. Eliz.

contra.

722. Yelv. 108. Cro. Jac.

^b Cro. Car. 272, 327. 3

185. Cro. Car. 282. 1 Lev.

Mod. 136.

69. 1 Sid. 84. 2 Ld. Raym.

^c 10 Mod. 318. 11 Mod.

1209.

382.

^z Cro. Eliz. 204. Hob. 251.

dimi-

diminution, that it was not the original upon which he declared, the court will grant a new *certiorari*; and if upon such writ there appears to be a good original, the plaintiff in error will not be suffered to make any allegation to the contrary ^d.

By the 21 *Jac.* 1. c. 13. "judgment after verdict shall not be stayed or reversed, by reason of any variance, in form only, between the original writ or bill, and the declaration, plaint, or demand." And by the 16 & 17 *Car.* I. c. 8. (which *Twisden* Justice used to call the *Omnipotent* act ^e;) "judgment shall not be stayed or reversed, for want of form, or pledges returned upon the original writ, or because the sheriff's name is not returned thereon, or for want of pledges upon any bill or declaration, &c." Lastly, by the 5 *Geo.* I. c. 13. (Lord *King's* act ^f;) "judgment after verdict shall not be stayed or reversed, for any defect or fault, either in form or substance, in any bill, writ original or judicial, or for any variance in such writs from the declaration or other proceedings."

^d Cro. Jac. 597. Palm.
428. 11 Mod. 382. and see
Run. *Eject.* 47, &c.

^e 1 Vent. 100.
^f 3 Atk. 601.

Secondly;

Secondly, The want of a *warrant* of attorney for either party is aided, after verdict, by the 32 *Hen. VIII.* c. 30. and 18 *Eliz.* c. 14. And, by the 21 *Jac. I.* c. 13. "judgment shall not be stayed or reversed, for that the plaintiff in ejectment, or other personal action, being under age, appeared by attorney." But if the *defendant* being under age, appears by attorney, it is still error^g: Though if an attorney undertake to appear for an infant defendant, the court will oblige him to do it in a proper manner^h.

Thirdly, Mistakes and omissions in the *declaration*, and other subsequent *pleadings*, are oftentimes cured by the statutes of Jeofails; which declare, "that judgment, after verdict, shall not be stayed or reversed, by reason of any mispleading, lack of colour, insufficient pleading or *jeofail*, or other default or negligence of the parties, their counsellors or attorniesⁱ; want of form in any count, declaration, plaint, bill, suit, or demand^k; lack of averment of any life, so as the person be proved to be alive^l; want of any *profert*, or the omission of *vi et armis* or *contra pacem*, mistaking the christian name

^g *Ante*, 116. Barnes, 413.

ⁱ 32 *Hen. VIII.* c. 30.

^h 2 *Str.* 114, 445.

^k 18 *Eliz.* c. 14.

^l 21 *Jac. I.* c. 13.

“ or surname of either party, sums, day,
 “ month or year, in any bill, declaration or
 “ pleading, being right in any writ, plaint,
 “ roll or record preceding, or in the same
 “ roll or record wherein the same is commit-
 “ ted, to which the plaintiff might have
 “ demurred, and shewn the same for cause,
 “ want of the averment of *hoc paratus est*
 “ *verificare*, or *hoc paratus est verificare per*
 “ *recordum*, or for not alledging *prout patet*
 “ *per recordum*, or the want of a right venue,
 “ so as the cause were tried by a jury of the
 “ proper county, where the action is laid; or
 “ any other matters of like nature, not be-
 “ ing against the right of the matter of the
 “ suit, nor whereby the issue or trial are al-
 “ tered ^m. ”

Fourthly, The misjoining of the *issue* is
 aided by the 32 Hen. VIII. c. 30. which also
 extends to any miscontinuance or discontinu-
 ance, or misconveying of process. But the want
 of a *similiter* was formerly holden not to be aided
 or amendable ⁿ: and where, in the *similiter*,
 the defendant's name was put instead of the
 plaintiff's, the chief justice dismissed the
 jury, conceiving that he had no commission

^m 16 & 17 Car. II. c. 8. ⁿ 1 Str. 641. 8 Mod. 376.

S. C.

to try the issue°. But in a subsequent case, where a similar mistake was made, the court, after trial of the issue, refused to arrest the judgment^p; and at length, the want of a *similiter* was holden to be amendable, upon three grounds; first, that it was merely an omission of the clerk; secondly, that it was implied in the *&c.* added to the last pleading; and thirdly, that by amending, the court only made that right, which the defendant himself understood to be so, by his going down to trial^a.

Fifthly, With respect to the *jury* process, it is provided, by the statute 21 *Jac.* I. c. 13.
 “ that after verdict, judgment shall not be
 “ stayed or reversed, by reason that the *venire*
 “ *facias, habeas corpora, or distringas* is award-
 “ ed to a wrong officer, upon any insufficient
 “ suggestion; or by reason the *visne* is in some
 “ part mis-awarded, or sued out of more
 “ places, or of fewer places, than it ought to
 “ be, so as some one place be right named;
 “ or by reason that any of the jury which tri-
 “ ed the said issue is mis-named, either in the
 “ surname or addition, in any of the said writs,

^p 2 Str. 1117.

^a Cowp. 407.

^p 3 Bur. 1793.

“ or in any return upon any of the said writs,
 “ so as upon examination it be proved to be
 “ the same man that was meant to be return-
 “ ed ; or by reason that there is no return
 “ upon any of the said writs, so as a panel of
 “ the names of the jurors be returned and an-
 “ nexed to the said writ ; or for that the she-
 “ riff’s name, or other officer’s name, having
 “ the return thereof, is not set to the return
 “ of any such writ, so as upon examination
 “ it be proved that the said writ was returned
 “ by the sheriff or under-sheriff, or any such
 “ other officer.”

If a *venire* be of the same action, and between the same parties, all other faults are amendable^r. But these are incurable ; and therefore in *ejectment*, if the *venire* be of a *plea of trespass*, omitting *and ejectment of farm*, it is ill, because not in the same action ; but if the *distringas* had been right, the court would have adjudged the *venire* to be null, and the want of it is aided^s. So in *scire facias* against an executor, to have execution of a judgment for damages in *trover*, it was moved in arrest

^r Gilb. C. P. 174.

in the *jurata* was amended,

^s *Id.* 175. Bul. Ni. Pri. 320. but see Cro. Car. 275, 278. where a similar mistake

the *venire* and *distringas* being right.

of judgment, that the *venire* was in a plea of debt, and a new *venire* was awarded^t. The statute 21 Jac. I. only extends to the *surnames* and additions of the jurors; and therefore if there be a mistake in the *christian* name, it is incurable^v. It is necessary, by this statute, that there should be a panel returned; therefore, if the sheriff return but 23 on the *venire*, and 24 on the *distringas* or *habeas corpora*, and the twenty-fourth omitted on the *venire* appears and is sworn, the verdict will be void^w: But if 12 of the 23 be sworn, and not the 24th, it is aided by the 18 Eliz. So where there were but 24 returned upon the panel annexed to the *venire facias*, and there were 48 on the *habeas corpora*, upon which the defendant made no defence; the court upon motion set aside the verdict without costs, saying, that the 21 Jac. I. means only the formal words upon the writ, for there must be a panel annexed to the return^w.

The statutes of jeofails are extended, by the statute for the amendment of the law^x, to

^t Cro. Jac. 528. Bul. Ni. C. P. 173.

Pri. 320.

^w Brown and Johnston, C.

^v 5 Co. 42. Cro. Car. B. T. 11 Geo. II. Bul. Ni. 202. Gilb. C. P. 177. Pri. 324.

^x 4 Ann. c. 16. § 2.

judgments entered upon confession, *nihil dicit*, or *non sum informatus*, in any court of record; and it is thereby enacted, “ that no such judgment shall be reversed, nor any judgment upon any writ of inquiry of damages executed thereon be staid or reversed, for or by reason of any imperfection, omission, defect, matter or thing whatsoever, which would have been aided and cured by any of the said statutes of jeofails, in case a verdict of twelve men had been given in the said action or suit, so as there be an original writ or bill, and warrants of attorney duly filed according to law.” And by a subsequent act⁷, this and all the statutes of jeofails are extended to writs of *mandamus*, and informations in nature of a *quo warranto*. As there cannot however be the same intendment, in support of a judgment by default, as after a verdict, it has been holden, that the statutes of jeofails do not protect judgments by default, against objections that are cured by a verdict at common law, but such only as are remedied after a verdict by the statutes².

The statute 32 *Hen. VIII. c. 30.* is confined to actions at common law; and in all the subsequent statutes of jeofails, there is a proviso,

⁷ 9 Ann. c. 20.

² 2 Str. 933.

that

that they shall not extend to *criminal* proceedings, nor to any writ, bill, action, or information upon any *popular* or *penal* statute, other than such as concern the customs and subsidies of tonnage and poundage^a. It has however been determined, that the statute 32 Hen. VIII. c. 30. extends to *penal* actions^b. And though, by the 16 and 17 Car. II. c. 8. the several omissions, variances and defects therein mentioned, are required to be *amended* by the judges of the court where the judgment is given, or the record removed by writ of error, yet an actual amendment is never made on this statute; but the benefit of the act is attained, by the court's overlooking the exception^c.

The motion in arrest of judgment, or for judgment *non obstante veredicto*, &c. may be made at any time before judgment is pronounced^d; though a new trial has been previously moved for^e. But it is against the ancient course of the court, to make a rule to stay judgment, unless the *postea* be brought in; and therefore it is said, that if one move in

^a 16 & 17 Car. II. c. 8. Hardw. 314, 15.

^b 3 Lev. 375. 1 Str. 136. ^d 2 Str. 845. 5 T. R. 2 Str. 1227. Doug. 115. 445.

^c 2 Str. 1011. Cas. temp. ^e Doug. 745, 6.

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arrest of judgment, he ought to give notice to the clerk in court on the other side; but the better way is, to give a rule upon the *postea*, for bringing it into court, and that is notice of itself^f.

^f 1 Salk. 78. 6 Mod. 24. S. C. and see 5 T. R. 454, 5.

C H A P. XL.

Of Judgments.

JUDGMENT is the sentence of the law, upon facts found or admitted. And it is either for the plaintiff, or for the defendant: for the former, by confession or *nihil dicit*; for the latter, on a *non pros*, discontinuance, *retraxit*, *nolle prosequi*, or nonsuit; and for either party, upon demurrer, *nul tiel record*, or verdict^a. The present chapter will be principally confined to the latter judgment, on an issue in fact, found by verdict; the other species of judgments having been already treated of.

If a new trial be not granted, or judgment arrested, &c. within the time limited by the rule for judgment, the prevailing party having stamped the *postea* with a double half-crown stamp, and got it marked by the clerk of the common bails, may tax his costs, and sign final judgment.

Costs are taxed by the master, upon a bill made out by the attorney for the prevailing

^a 1 Str. 395.

party;

party; or more frequently without a bill, upon a view of the proceedings: and if there have been any *extra* expences, which do not appear on the face of the proceedings, there should be an affidavit made of such expences, to warrant the allowance of them; which is called an affidavit of increased costs^b. It is usual, among fair practisers, to give notice to the opposite attorney, of the time when the costs are intended to be taxed^c; but in order to enforce it, there must be a rule to be present at taxing costs: which rule is obtained from the clerk of the rules, and a copy of it should be duly served; after which, if the costs are taxed without notice, the taxation is irregular, and the attorney liable to an attachment.

No costs were recoverable by the plaintiff or defendant at common law^d. But by the statute of *Gloucester*, (6 *Edw. I.*) c. 1. § 2. it is provided, "that the demandant may recover against the tenant the costs of his *writ* purchased (which, by a liberal interpretation, has been construed to extend to the *whole* costs of his suit^e), together with the damages given by that statute; and that this act

^b Imp K. B. 348.

^c *Id.* 349.

^d 2 Inst. 288. Hardr. 152.

^e 2 Inst. 288.

shall hold place, in all cases where a man recovers damages." This was the origin of costs *de incremento*^f. And hence the plaintiff has, generally speaking, a right to costs, in all cases where he was entitled to damages, antecedent to, or by the provisions of, the statute of Gloucester^g; as in *assumpsit*, covenant, debt on contract, case, trover, trespass, assault and battery, replevin, ejectment, dower *unde nihil habet*^h, &c.; or where, by a subsequent statute, double or treble damages are given, in a case where single damages were before recoverableⁱ; as upon the 2 Hen. IV. c. 11. for suing in the admiralty court^j, &c. And he has also a right to costs, in all cases where a certain penalty is given by statute to the party grieved^k; for otherwise the remedy might prove inadequate.

But the statute of Gloucester did not extend to cases where no damages were recoverable at common law, as in *real actions*, *scire facias*, *prohibition*^l, &c.; nor where double or treble damages were given by a subsequent statute,

^f Gilb. Eq. Rep. 195.

^g 10 Co. 116. a.

^h 2 Bac. Abr. 148.

ⁱ 10 Co. 116. a. 2 Inst. 289. Cowp. 368.

^j *Ante*, 589.

^k Cro. Car. 560. 1 Roll.

Abr. 574. Skin. 363.

Carth. 230. 1 Salk. 206.

1 Ld. Raym. 172. Say.

Costs, 11. H. Blac. 1 V. 10.

^l Comb. 20.

in a new case where *single* damages were not before recoverable; as in *waste* against tenant for life or years ^m, upon the statute of *Gloucester*, (6 *Edw. I.*) c. 5; for not setting out tithes ⁿ, upon the 2 & 3 *Edw. VI.* c. 1; or for driving a distress out of the hundred ^o, upon the 1 & 2 *Pb. & M.* c. 12. Nor does this statute extend to *popular* actions, where the whole or part of a penalty is given by statute to a common informer ^p; as, upon the 5 *Edw. c. 4.* § 31. for exercising a trade, without having served an apprenticeship; or upon the statute of usury, 12 *Ann.* stat. 2. c. 16. In these and such like cases, therefore, the plaintiff is not entitled to costs, unless they are expressly given him by the statute; but wherever they are so given, he is of course entitled to them.

Where *single* damages are given by a statute, subsequent to the statute of *Gloucester*, in a new case wherein no damages were previ-

^m 2 Hen. IV. 17. 9 Hen. VI. 66. b. 10 Co. 116. b. 2 Inst. 289.
ⁿ Moor, 915. Noy, 136. Hardr. 152.
^o 2 Inst. 289. Dyer, 177. But see Cro. Car. 560. 1 Roll. Abr. 574.
^p 1 Roll. Abr. 574. 1 Vent. 133. Carth. 231. 1 Salk. 206. 1 Ld. Raym. 172. Cas. Pr. C. B. 87. Barnes, 124. S. C. Cowp. 306. H. Blac. 1 V. 10. Bul. Ni. Pri. 333.

ously recoverable, it has been doubted whether the plaintiff shall recover costs, if they are not mentioned in the statute. The rule in *Pilfold's* case is, that he shall not^a; and accordingly it is holden, that he is not entitled to costs in *quare impedit*^r, wherein damages are given by the statute of *Westm. 2.* (13 *Edw. 1.*) c. 5. § 3. But the rule in *Pilfold's* case is contradicted by lord *Coke* himself^s, who says, that "this clause (respecting the statute of *Gloucester's* holding place, in all cases where a man recovers damages) doth extend to give costs, where damages are given to any demandant or plaintiff, in any action, by any statute made *after* this parliament." And the rule has been since narrowed, by several modern decisions; from whence it may be collected, that the plaintiff is entitled to costs, in all cases where single damages are given by statute to the party grieved^t, although costs are not particularly mentioned in the statute,

^a 10 Co. 116. a.

^s 2 Inst. 289.

^r 2 Hen. IV. 17. 27 Hen. VI. 10. 10 Co. 116. a. 2 Inst. 289, 362. Barnes, 140. And see Cro. Car. 360. Carth. 231. Cowp. 367, 8.

^t 2 Will. 91. Barnes, 151. S. C. 3 Bur. 1723. Say, Costs, 10. S. C. 1 T. R. 71. But see the opinion of *Aston*, Just. *contra*. Cowp. 367, 8.

In several of the foregoing cases, wherein costs were not recoverable by the plaintiff at common law, they are expressly given him by the statute 8 & 9 *W. III. c. 11.* by which it is enacted, that “in all actions of *waste*, and actions of debt upon the statute for not setting forth *tithes*, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles; and in all suits upon any writ or writs of *scire facias*, and suits upon *prohibitions*, the plaintiff obtaining judgment, or any award of execution, after plea pleaded or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum*, *fieri facias*, or *elegit*.”

Upon this statute there have been the following determinations:

In an action of debt for the *penalty* of the statute 2 & 3 *Edw. VI. c. 13.* for not setting out tithes, with a count for the *single* value, after a demurrer to the declaration, the parties submitted to arbitration, and the arbitrator awarded the single value to be less than twenty

ty nobles (6 L. 13 s. 4 d.); the court held, that the plaintiff was not entitled to costs on the counts for the penalty, under the statute 8 & 9 W. III. c. 11. the value not having been found by the jury; but they allowed him to have the costs taxed, on the count for the single value^u.

In *scire facias*, the plaintiff is not entitled to costs, unless the defendant has appeared and pleaded: And no costs are payable by the plaintiff, on moving to quash his own writ before plea^v, nor after a plea in abatement^w. In *Prohibition*, the rule is, that the plaintiff, succeeding after plea pleaded or demurrer joined, ought to have his costs from the time of the suggestion, or first motion for a prohibition, and all costs incident and subsequent thereto^x. And where the defendant pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, the court held this not to be a plea within the statute, but a mere sham plea, and ordered the defendant to pay the plaintiff's costs of the proceedings in prohibition^y. Where the defendant in prohibition

^u H. Blac. 1 V. 107. and see Barnes, 150.

^v Caf. Pr. C. B. 74.

^w 1 Str. 638.

^x Caf. Pr. C. B. 11. 1 Str. 82. 2 Str. 1062.

^y Barnes, 148.

lets judgment go by default, the plaintiff is entitled, by the common law, to a writ to inquire of his *damages*, for the contempt in proceeding after the prohibition delivered; and, of consequence, by the statute of *Gloucester*, to his *costs*^z. In this case, however, the plaintiff is only entitled to costs, from the time that the rule for a prohibition was made absolute, as the defendant could not possibly be in contempt before^a. And where the plaintiff was nonsuited, it was holden, that the defendant ought only to have the costs of the nonsuit, and not what were incurred by opposing the rule to shew cause, why the writ of prohibition should not be granted^b. If judgment be given for the plaintiff, as to *part* of what is in issue, he is entitled to costs, although a consultation be granted as to the residue^c. And, in like manner, if the defendant prevail as to *part*, he is entitled to costs^d. But it seems, that if the defendant succeed upon demurrer, he is not entitled to costs^e, this being a *casus omissus* out of the statute. There is a proviso in the statute^f, that it

^z Caf. Pr. C. B. 20.

^a *Id.* 21.

^b Say. Costs, 137.

^c 2 Str. 1062, 3.

^d Barnes, 138, 139.

^e *Brymer and Atkins*, H. 29 Geo. III. C. B.

^f § 5.

shall

shall not extend to executors or administrators; and hence it has been determined, that in *scire facias*^g or *prohibition*^h, they are not liable, when plaintiffs, to the payment of costs.

The plaintiff's general right to costs being thus settled and established, upon the footing of the statute of *Gloucester*, has been since altered, restrained, and modified, by subsequent statutes. The first statute that restrained the plaintiff's right to costs, was the 43 *Eliz.* c. 6. (extended to *Wales*, and the counties *palatine*, by the 11 & 12 *W.* III. c. 9.); by which it is enacted, that "if in any personal action, to be brought in any of her majesty's courts of *Westminster*, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and be so signified by the justices before whom the same shall be tried, that the debt or damages to be recovered therein shall not amount to the sum of forty shillings, that in every such case the judges or justices, before whom such action shall be pursued, shall not award to the plaintiff any more costs than

^g 1 Str. 188.

Reg. 118. Barnes, 127,

^h Caf. Pr. C. B. 158. Pr. 129. S. C.

the sum of the debt or damages so recovered shall amount to, but less at their discretion." The intention of this statute was to confine trifling actions to inferior courtsⁱ; and a certificate may be granted upon it, at any time after the trial of the cause^k. The first instance of a certificate being granted, upon this statute, was in the case of *White v. Smith*, E. 17 Geo. II.; wherein *Willes* Ch. J. certified in an action for taking sand^l. And since that time, certificates have been not infrequent^m. But as the judges, for a long time, were unwilling to certify upon this statute, thinking it hard to deprive a plaintiff of his right to costs, merely because he had resorted to a superior court, when perhaps he could not have obtained justice in an inferior one, the legislature was obliged to interpose its authority, still farther to guard against trifling and vexatious actions.

Thus, by the 3 Jac. I. c. 15. § 4. it is enacted, that "if in any action of debt, or action upon the case upon an *assumpsit* for the recovery of any debt, to be sued or prosecuted

ⁱ Gilb. Eq. Rep. 196.
Gilb. C. P. 261, 2.

^l 2 Str. 1232. 1 Willf. 93.
S. C. 3 Willf. 325.

^k Say. Costs, 18. 3 T.
R. 38. (d).

^m *Id.* Say. Rep. 250. 2
Willf. 258. 3 T. R. 37.

against

against any citizen and freeman of the city of *London*, or any other person, being a victualler, tradesman, or labouring man, inhabiting within the said city or the liberties thereof, in any of the king's courts at *Westminster*, or elsewhere, out of the court of requests for the same city, it shall appear to the judge or judges of the court where such action shall be sued or prosecuted, that the debt to be recovered by the plaintiff shall not amount to the sum of forty shillings, and the defendant shall duly prove, either by sufficient testimony or his own oath, that at the time of commencing such action, the defendant was inhabiting and resident in the city of *London* or the liberties thereof, the said judge or judges shall not allow to the plaintiff any costs of suit, but shall award the plaintiff to pay so much ordinary costs to the defendant, as the defendant shall justly prove, before the said judge or judges, it hath truly cost him in defence of the suit."

Which statute has been since extended, by the 14 *Geo. II. c. 10.* to "every citizen and freeman of the city of *London*, and every other person and persons inhabiting within the said city or its liberties, and also to persons renting or keeping any shop, shed, stall, or stand, or seeking a livelihood there, who have debts

owing them, not exceeding the sum of forty shillings, by any person or persons inhabiting or seeking a livelihood within the said city or its liberties, during their respective inhabitation or seeking a livelihood as aforesaid."

And towards the latter end of the last reign, several acts of parliament were made, establishing courts of conscience in various districts, in and about the metropolis; as in the town and borough of *Southwark*, &c. by the 22 Geo. II. c. 47. (explained and amended by the 32 Geo. II. c. 6.); in the city and liberty of *Westminster*, and part of the dutchy of *Lancaster*, by the 23 Geo. II. c. 27. (explained and amended by the 24 Geo. II. c. 42.); and in the *Tower-hamlets*, by the 23 Geo. II. c. 30. And, by the 23 Geo. II. c. 33. the county court of *Middlesex* was put on a different footing, for the more easy and speedy recovery of small debts.

In these acts of parliament there are exceptions, respecting the *causes* and *persons*, of which and over whom the courts are to have jurisdiction. Thus, in the 3 Jac. I. c. 15. there is an exception or provisoⁿ, that "it shall not extend to any debt for *rent* upon any lease of lands or tenements, or any other real

ⁿ § 6.

contracts,

contracts, nor to any other debt that shall arise by reason of any cause concerning a testament or matrimony, or any thing concerning or properly belonging to the ecclesiastical court, although the same be under forty shillings." And there is a similar exception in the court of conscience act for the *Tower-hamlets*^o; which exception has been construed to apply to an action for use and occupation^p. The court of conscience act for *London*^q is confined to cases, where both plaintiff and defendant are resident within the jurisdiction of the court^r; and it does not apply, where the plaintiff recovers less than forty shillings, in a special action on the case, for the breach of an agreement^s. Also, it is a constant and invariable rule, that none of the court of conscience acts extend to cases, where the sum recovered is reduced under forty shillings, by means of a set-off^t, or tender^u. Where a cause is referred to arbitration, and the costs are directed to abide the event of the suit, the plaintiff is not intitled to them, if it appear by the award that his original demand was under

^o Doug. 245.

^p *Id.* 244.

^q 14 Geo. II. c. 10.

^r 5 T. R. 535.

^s *Id.* 529.

^t 2 Str. 1191. 1 Will.

19. S. C. 2 Will. 68. 3

Will. 48. Say. Costs, 65.

S. C.

^u Doug. 448, 9.

forty shillings; and he might have recovered it in a court of conscience ^r.

Respecting *persons*, the court in one instance permitted a suggestion to be entered on the roll, in an action brought by an *administrator* ^s. But in an action brought against an *executor*, they refused it^t; saying, it could not be meant to give the court of conscience a jurisdiction over executors; and that if there was no express exception, there was one implied from the nature and reason of the thing. An *attorney* is not subject to the jurisdiction of the county court of *Middlesex* ^u; but in *Westminster* ^v, and the *Tower-hamlets* ^w, he is expressly subjected thereto. And where an *attorney*, or other person, is sued in a superior court, for a debt under forty shillings, he may, according to a late determination ^x, move the court to stay the proceedings.

By the *Westminster* court of conscience act, the mode prescribed for a defendant to obtain

^r 3 T. R. 139. *Waston* v. ^s 2 Will. 42. Doug. 380.
Gibson, H. 30 Geo. II. 3 Bur. 1583. *semb. contra.*
^s Doug. 246. ^v Doug. 380.
^t *Id.* 263. stat. 14 Geo. II. ^w Stat. 19 Geo. III. c.
 c. 10. 5 T. R. 535. *Id.* 68. § 24.
 529. ^x 4 T. R. 495.

his costs is by *plea*; and if that mode be not adopted, the court will not, after verdict, enter a *suggestion* on the record, that the defendant lived within the jurisdiction, or stay the proceedings^y. But in general, where the act is not pleaded, the proper mode is, for the defendant to apply to the court, by affidavit, for leave to enter a suggestion on the roll, of the facts necessary to entitle him to the benefit of the act^z: which suggestion may be traversed or demurred to. And where the plaintiff demurred to the suggestion, which was adjudged against him, the costs of the application were allowed; as well as of the trial and former proceedings^a; though not, strictly speaking, costs of the defence. But where the inquest is taken by default, there can be no suggestion on the roll^b; for the defendant is out of court, as to all purposes, but that of having judgment against him.

By the 21 *Jac.* I. c. 16. it is enacted, that “in all actions upon the case for slanderous words, to be sued or prosecuted in any of the courts of record at *Westminster*, or in any

^y 3 T. R. 452.

S. C. 2 Wils. 68.

^z 1 Str. 47, 50. 2 Str.

^a 2 Str. 1120.

1120. Barnes, 353. Say.

^b 1 Str. 46.

Rep. 273. Say. Costs, 64.

court whatsoever that hath power to hold plea of the same, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same; any law, statute, or usage to the contrary notwithstanding." The operation of this statute is confined to actions for slanderous words spoken of the *person*, and does not extend to actions for slander of *title*^c, &c. wherein the special damage is the gist of the action: neither, for the same reason, does it extend to an action for special damage, in consequence of words not in themselves actionable^d; though, where the words are actionable in themselves, a special damage will not take the case out of the statute^e. This statute applies to a writ of *inquiry*, as well as a *trial*, where the damages are under

^c Cro. Car. 141, 163. 1 Str. 936. S. C. Barnes, Str. 645. 132, 142. 3 Bur. 1688.

^d 2 Ld. Raym. 831. 1 2 Blac. Rep. 1062. Say. Salk. 206. 7 Mod. 129. S. Costs, 25. S. C. Caf. Pr. C. Barnes, 135. C. B. 137. *contra*:

^e 2 Ld. Raym. 1588. 2

forty shillings^f; and a *justification* found for the plaintiff will not, in that event, entitle him to full costs^g.

But the *principal* statute, made for restraining the plaintiff's right to costs, is the 22 & 23 Car. II. c. 9. (extended to *Wales*, and the counties *palatine*, by the 11 & 12 W. III. c. 9.); by which it is enacted, that "in all actions of trespass, assault and battery, and other personal actions, wherein the judge, at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question; the plaintiff, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit, than the damages so found shall amount unto." It seems to have been the intention of this statute, that the plaintiff shall have no more costs than damages, in any personal action whatsoever, if the damages be under forty shillings, except in cases of battery or freehold; and not even in these, without a certificate. And this construction was adopted, in some of the

^f 2 Str. 934.

^g Barnes, 128.

first cases that arose upon the statute ^h. But a different construction soon prevailed; and it is now settled, that the statute is confined to actions of assault and battery; and actions for *local* trespasses, wherein it is possible for the judge to certify, that the freehold or title of the land was chiefly in question ⁱ. Therefore it does not extend to actions of *assumpsit*, debt, covenant, trover ^k, false imprisonment, or the like; or to actions for a mere assault ^l; or for criminal conversation ^m, or battery of the plaintiff's servant ⁿ, *per quod consortium vel servitium amisit*.

In actions for *local* trespasses, the statute applies, wherever an injury is done to the *freehold* ^o, or to any thing *growing* ^p upon, or *affixed* ^q to, the freehold: and in a modern

^h 3 Keb. 121, 247.

208. 1 Str. 192.

ⁱ T. Raym. 487. T. Jon.

^o 2 Vent. 48. Com. Rep.

232. 2 Show. 258. S. C.

19. 1 Salk. 208. 1 Str.

3 Mod. 39. 1 Salk. 208.

577, 633, 645. Gilb. Eq.

1 Str. 577. Gilb. Eq. Rep.

Rep. 195. 2 Str. 726. 2

195. Barnes, 134. 3 Willf.

Ld. Raym. 1444. S. C.

322. S. C. H. Blac. 1 V. 294.

^p *Hill v. Reeves*, Bul. Ni.

^k 3 Keb. 31. 1 Salk. 208.

Pri. 330. Barnes, 144.

^l 3 T. R. 391.

^q *Birch v. Da ffy*, Bul. Ni.

^m 3 Willf. 319.

Pri. 330 1 Str. 633. Cas. Pr.

ⁿ 3 Keb. 184. 1 Salk.

C. B. 86. Barnes, 121.

case^r, it was carried still further. That was an action of trespass *quare clausum fregit*: the first count stated, that the defendants broke and entered the close of the plaintiffs, and the grass of the plaintiffs there then growing, with their feet in walking, trod down, spoiled, and consumed; and dug up and got divers large quantities of turf, peat, sods, heath, stones, soil and earth of the plaintiffs, in and upon the place in which, &c.; and took and carried away the same, and converted and disposed of the same to their own use. There was another count, upon a similar trespass, in another close. The defendants pleaded the general issue to the *whole* declaration, and two special pleas to the *second* count. And, on the trial, a verdict was found for the plaintiffs on the general issue, with one shilling damages; and for the defendants on the special pleas, and the judge had not certified. *Per Lord Mansfield*: "The question on this record is, whether the plaintiffs are entitled to any more costs than damages, under the statute 22 & 23 Car. II. c. 9.?" There is a puzzle and per-

^r Doug. 779. and see 1 *accord.* but see 2 Vent. Str. 633, 645. Gilb. Eq. 215. Skin. 66. Com. Rep. Rep. 197, 8. S. C. 3 Bur. 19. 1 Salk. 208. 1 Str. 192. 1282. Say. Costs, 50. S. C. *semb. contra.*

plexity in the cases on this part of the statute, and a jumble in the reports; and as the question is a general one, we thought it proper to consult all the judges; and they are all of opinion, that this case is within the statute, and that the plaintiffs ought to have no more costs than damages. You will observe, that what has been called an *asportavit* in this declaration, is a mode or qualification of the injury done to the land. The trespass is laid to have been committed on the land by digging, &c. and the *asportavit* as part of the same act; and, on the trial of the issue, the freehold certainly *might* have come in question. This is clearly distinguishable from an *asportavit* of personal property, where the freehold cannot come in question, and which therefore is not within the act. Thus, after trees are cut down, and thereby severed from the freehold, if a trespasser comes and carries them away, that case is not within the statute, because the freehold cannot come in question: here it might."

Where an injury is done to a *personal* chattel, it is not within the statute^s; nor where an injury to a personal chattel is laid, in the

^s 3 Keb. 389, 469. T. Str. 534. Gilb. Eq. Rep. Jon. 232. 1 Salk. 208. 1 197. S. C.

same declaration, with an assault and battery, or local trespass¹. And consequently, in these cases, though the damages be under forty shillings, the plaintiff is entitled to full costs, without a certificate. But then it must be a substantive and independent injury: for where it is laid, or proved, merely in aggravation of damages, as a mode or qualification of the assault and battery, or local trespass², or there is a verdict for the defendant, upon that part of the declaration which charges him with an injury to a personal chattel³, it is within the statute. So where a *laceravit*, or tearing of the plaintiff's cloaths, is laid in the declaration, or found by the jury, to be merely consequential to⁴, or committed at the same time⁵ as an assault and battery, the plaintiff, recovering less than forty shillings damages, is not entitled to full costs, without a certificate.

The certificate required by this statute need not, it seems, be granted at the trial of

¹ 3 Mod. 39. 1 Salk. 208. ² 2 Vent. 180, 195. Caf.
³ 1 Str. 192, 551. Gilb. Eq. Pr. C. B. 118.
⁴ Rep. 197 S. C. Barnes, ⁵ Say. Rep. 91. 1 T. R.
 119, 120, 134 3 Willf. 322. 655.
 S. C. 2 Str. 1130. Say. ⁶ H. Blac. 1 V. 291. 5
 Costs, 39. T. R. 482.

⁷ 1 Str. 624. *Ante*, 650.

the cause^a. And where the defendant lets judgment go by default^b, or *justifies* the assault and battery, or pleads in such a manner, as to bring the freehold or title of the land in question, on the face of the record, or a *view* is granted^c, a certificate is holden to be unnecessary. But where, in an action for an assault and battery, the defendant justifies the assault only^b, or an assault only is certified by the judge^c, the plaintiff, recovering less than forty shillings, is not entitled to more costs than damages; though, in the latter case, to entitle him to full costs, the judge may certify, on the 8 & 9 *W. III. c. 11.* that the assault was wilful and malicious^d. The *award* of an arbitrator is not tantamount to a judge's certificate, under the 22 and 23 *Car. II. c. 9*^e.

Where the plea or issue, though special, is *collateral* to the question of freehold or title to the land, as where the defendant justifies an entry as bailiff under process, and issue is joined upon the door's being shut^f, or where,

^a 11 Mod. 198.

^c 2 Lev. 102.

^b Bul. Ni. Pri. 329.

^d 3 Will. 326.

^c 1 Ld. Raym. 76. 2 Salk.

^e 3 T. R. 138.

665. S. C.

^f 2 Barnardist. K. B. 277.

^b 3 T. R. 391.

but see H. Blac. 2 V. 2.

upon

upon a plea of a distress for rent, there is an issue on the defendant's being bailiff^g, a certificate is necessary, to entitle the plaintiff to full costs: and it is also necessary, where the plaintiff recovers less than forty shillings damages, on a replication of *extra viam*^h, or plea of not guilty to a new assignmentⁱ. But where the plaintiff is entitled to costs upon the new assignment, he is entitled to the costs of all the previous pleadings^k.

None of the statutes, made for restraining the plaintiff's right to costs, extend to actions brought in an *inferior* court, and removed by the defendant into a *superior* one^l: and it has been holden, that the 21 *Jac.* I. c. 16^m. and the 22 & 23 *Car.* II. c. 9ⁿ. only restrain the *court* from awarding more costs than damages; but the *jury*, not being restrained thereby, may give what costs they please.

The restraint put upon the plaintiff's general right to costs, by the 22 & 23 *Car.* II.

^g Say. Rep. 250.

Id. 149. Bul. Ni. Pri. 330.

^h *Cochran v. Harrison*, T.

^k 1 T. R. 636.

22 Geo. III. K. B. but see

^l 2 Lev. 124. 4 Mod.

2 Lev. 234. 2 Ld. Raym.

378, 9. 1 Ld. Raym. 395.

1444. 2 Str. 726. S. C. *Id.*

Caf. Pr. C. B. 45. (a).

1168. Say. Rep. 251. *contra*.

^m 1 Salk. 207.

ⁱ Barnes, 124, 129. S. C.

ⁿ Caf. Pr. C. B. 45.

c. 9. has been since *partly* taken off, by subsequent statutes. Thus, by the statute 4 & 5 W. & M. c. 23. § 10. after reciting, that great mischiefs ensue by inferior tradesmen, apprentices, and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves and damage of their neighbours, it is enacted, that "if any such person shall presume to hunt, hawk, fish, or fowl (unless in company with the master of such apprentice, duly qualified by law), such person shall be subject to the penalties of this act, and shall or may be sued or prosecuted for his wilful trespass, in such his coming on any person's land; and if found guilty thereof, the plaintiff shall not only recover his damages thereby sustained, but his *full* costs of suit; any former law to the contrary notwithstanding." It has been holden, that a *clothier* is an inferior tradesman, within the meaning of this statute^o; and it is said, that the words "*inferior tradesmen*" extend to every tradesman who is not qualified to kill game^o: but this was doubted in a subsequent case^p, wherein the judges were divided in

^o Barnes, 125.

54. S. C.

^p 2 Will. 70. Say. Costs,

opinion;

opinion, upon the question, whether a *surgeon* and *apothecary* should be considered as an inferior tradesman.

So, by the 8 & 9 W. III. c. 11. § 4. for the preventing of wilful and malicious trespasses, it is enacted, that "in all actions of trespass, to be commenced or prosecuted in any of his majesty's courts of record at *Westminster*, wherein at the trial of the cause it shall appear, and be certified by the judge under his hand, upon the back of the record, that the trespass, upon which any defendant shall be found guilty, was *wilful* and *malicious*, the plaintiff shall recover not only his damages, but his *full* costs of suit; any former law to the contrary notwithstanding." The certificate, required by this statute, need not be granted at the trial of the cause^a; and it is said, that the statute extends to every trespass, that is not accidental as well as trifling^r.

Where the declaration consists of several counts, the plaintiff in this court is only entitled to the costs of such as are found for

^a *Swinerton v. Jarvis*, E. 21. Doug. 108. n. *contra*.
 22 Geo. III. C. B. 1 T. R. 6 Mod. 153.
 636. K. B. but see 2 Willf.

him^s; and neither party is allowed the costs of those which are found for the defendant^r. Where the plaintiff's declaration consisted of two counts, to one of which the defendant pleaded the general issue, which was found for the plaintiff, and to the other a justification, to which the plaintiff demurred, and judgment was thereupon given for the defendant; the court agreed, that the defendant could have no costs upon the demurrerⁿ. But if there be two distinct causes of action, in two separate counts, and as to one the defendant suffers judgment to go by default, and as to the other takes issue, and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff is intitled to judgment and costs on the first count v.

^s But it is otherwise in 335. 2 Blac. Rep. 800, 1199.
the *Common Pleas*, for there, ^r Say. Costs, 212. Doug.
if the plaintiff succeed up- 677. but see 1 Will. 331.
on any one of the counts, ⁿ Say. Costs, 211. 2 Bur.
he is intitled to the costs of 1232. S. C. *Tamen quære*,
his whole declaration; tho' and see the stat. 8 & 9 W.
the defendant succeed upon III. c. 11. § 2.
the others. Bul. Ni. Pri. v 3 T. R. 654.

It has already been observed ^w, that no costs were recoverable by a *defendant* at common law: and the reason seems to be, that if the plaintiff failed in his suit, he was amerced to the king *pro falso clamore*, which was thought to be a sufficient punishment, without subjecting him to the payment of costs. The first instance of costs being given to a defendant, was in a writ of right of *ward*, by the statute of *Marleberge*, (52 Hen. III.) c. 6. Afterwards, costs were given to the defendant in *error*, by the 3 Hen. VII. c. 10. and in *replevin*, by the 7 Hen. VIII. c. 4. and 21 Hen. VIII. c. 19, &c. But in one of these cases, the defendant is to be considered as an actor; and in the other of them, the provision is virtually for the benefit of the plaintiff in the original action ^x.

In *error*, brought by the defendant *before* execution ^y, or by the plaintiff upon a judgment for the defendant, if the judgment be affirmed, the writ of error discontinued, or the plaintiff in error nonsuited, the defendant in error is entitled to costs, by the 3 Hen. VII. c. 10. and 8 & 9 W. III. c. 11. § 2.; upon the former of which statutes it has been hold-

^w *Ante*, 632.

^y *Cro. Jac.* 636.

^z *Say. Costs*, 70.

en, that costs are recoverable in error, for the delay of execution, although none were recoverable in the original action². By the 13 *Car.* II. stat. 2. c. 2. § 10. if the judgment be affirmed after verdict, the plaintiff shall pay to the defendant in error, his *double* costs. And by the 4 *Ann.* c. 16. § 25. for preventing vexation, from suing out defective writs of error, it is enacted, that "upon the quashing of any writ of error, for variance from the original record, or other defect, the defendant shall recover against the plaintiff in error his costs, as he should have had, if the judgment had been affirmed, and to be recovered in the same manner³:" which costs include those of the motion, for quashing the writ of error^b. And though no costs were recoverable in the original action, they are payable, on quashing a writ of error^c. But where the defendant in error enters continuances, to defeat the writ of error, the plaintiff in error is not lia-

² Dyer, 77. Cro. Eliz. *semb. contra.*

617, 659. 5 Co. 101. S. C. ^a 2 Str. 834. Cas. temp.

Cro. Car. 145. 1 Str. 262. Hardw. 137.

2 Str. 1084. but see Cro. ^b 2 Ld. Raym. 1403. 1

Car. 425. 1 Lev. 146. 1 Str. 606. 8 Mod. 316.

Vent. 38, 166. 4 Mod. S. C.

245. Carth. 261. S. C. ^c 1 Str. 262.

ble to costs, on quashing it^d: And none of the statutes before mentioned give costs, upon the *reversal* of a judgment^e.

In *replevin*, or second deliverance, the defendant, making avowry, cognizance, or justification, for rents, customs, or services, or for damage feasant, is entitled to costs, by the 7 *Hen. VIII. c. 4.* and 21 *Hen. VIII. c. 19.* § 3. if the avowry, cognizance, or justification be found for him, or the plaintiff be nonsuit, or otherwise barred: which statutes extend to avowries, &c. made by an *executor*^f, or for an *estray*^g, and, as it should seem, for an *amercement* by a court leet^h; but not to pleas of *prisel en auter lieu*, upon which the writ is abatedⁱ, or to pleas of *property* in the thing distrained^k. By the 17 *Car. II. c. 7.* § 2. the defendant obtaining judgment thereon, for the arrearages of rent, or value of the goods distrained, is also entitled to his *full* costs of suit. And by the 11 *Geo. II. c. 19.* § 22. if the defendant avow, or make cognizance, according to that statute, upon a

^d 1 Str. 139. 2 Str. 834.
Barnes, 250.

^h Cro. Jac. 520. but see
Cro. Eliz. 300. *semb. contra.*

^e 1 Str. 617.

^f 2 Rol. Rep. 437.

^g Cro. Eliz. 330.

ⁱ Com. Rep. 122.

^k Hardr. 153.

distress for rent, relief, heriot, or other service, and the plaintiff be nonsuit, discontinue his action, or have judgment against him, the defendant shall recover *double* costs of suit. But this latter statute does not extend to a seizure for a heriot custom¹.

At length, by the statute 23 Hen. VIII. c. 15. § 1. it was enacted, "that in trespass upon the statute 5 Rich. II. debt, covenant, detinue, account, trespass on the case, or upon any statute for an offence or wrong personal, immediately supposed to be done to the plaintiff, if the plaintiff, after the appearance of the defendant, be nonsuited, or a verdict pass against him, the defendant shall have judgment to recover his costs against the plaintiff, to be assessed and taxed by the discretion of the judge or judges of the court, where such action shall be commenced or sued; and shall have such process and execution, for the recovery of the same, against the plaintiff, as the plaintiff should or might have had against the defendant, in case judgment had been given for the plaintiff."

But by § 2. of the same statute, it is provided, that "every *poor* person, being plaintiff in any such action, who at the com-

¹ Barnes, 148.

mencement of his suit shall be admitted, by the discretion of the judge or judges where the action is pursued, to have his process and counsel of charity, without paying money or fee for the same, shall not be compelled to pay any costs, by virtue of this statute; but shall suffer other punishment, as by the discretion of the justices, before whom the suit shall depend, shall be thought reasonable."

A *pauper* or *poor* person, in the eye of the law, is one who will swear that he is not worth ten pounds, after all his debts are paid, except his wearing apparel, and the subject matter of the action^m; and such a one may, upon petition, and affidavit of his extreme poverty, supported by a certificate of his cause of action, be admitted to sue *in formâ pauperis*: which admission may be either at the commencement of the suit, or afterwards *pendente lite*ⁿ. And upon his being so admitted, an attorney and counsel shall be assigned him, pursuant to the statute 11 Hen. VI. c. 12.; and he shall be permitted to carry on the proceedings *gratis*, without using stamps^o, or paying fees to the officers of the court, unless

^m 2 Lil. P. R. 633.

^o Stat. 5 W. & M. c. 21.

ⁿ Say. Costs, 90. 3 Wilf. § 14, &c.

he obtain a verdict for more than ten pounds, and then the officers shall be paid their court fees, and for passing the record, &c. Neither, as we have just seen, is a pauper liable to pay costs to the defendant, if he be nonsuited, or have a verdict against him; but shall suffer other punishment at the discretion of the justices. It has been said, that if a pauper be nonsuited, he shall pay costs or be whipped^p: but this punishment does not appear to have been ever inflicted^q. If the pauper do not proceed to trial according to notice, or otherwise misbehave himself, the court will order him to be dispaupered^r: but until this be done, they will not make any rule about costs^s. And, unless the pauper's conduct appear to have been vexatious, the court will not stay the proceedings in a second action, until the costs are paid, of a nonsuit in a prior one, for the same cause^t: nor, if the pauper should succeed in the second action, will they deduct the costs of the first, out of those recovered in the second^u.

^p 1 Sid. 261. 2 Salk. 506. but see Cas. Pr. C. B. 47.
⁷ Mod. 114. 1 Str. 420. *semb. contra.*

^q *Id. ibid.*

^r 2 Str. 878, 1121. 3

^s 2 Lil. P. R. 633. 2 Willf. 24. but see 2 T. R.
 Salk. 506. 2 Str. 1122. 511.

^t 2 Str. 878. 3 Willf. 24. ^u 2 Str. 891.

Executors and administrators are not particularly excepted out of the statute 23 *Hen. VIII.* c. 16. yet, as that statute only relates to contracts made with, or wrongs done to the plaintiff^v, it has been uniformly holden^w, that they are not liable to costs, upon a nonsuit or verdict, where they necessarily sue in their representative character, and cannot bring the action in their own right; as upon a *contract* entered into with the testator or intestate^x, or for a *wrong* done in his life-time^y. But where the cause of action arises after the death of the testator or intestate, and the plaintiff may sue thereon in his own right, he shall not be excused from the payment of costs, though he bring the action as executor or administrator; as upon a *contract*^z, express or implied, or in *trover*^a, for a conversion after the death of the testator or intestate. An execu-

^v 2 Str. 1107.

^z 6 Mod. 91, 181. 1

^w Cro. Eliz. 503. Cro. Salk. 207. S. C. 1 Ld. Jac. 229. 2 Bullst. 261. Raym. 436. 1 Str. 682. 1 Salk. 207, 314. 3 Bur. Barnes, 119. 2 Str. 1106. 1586. Say. Costs, 97. 4 T. R. 277. 5 T. R. 234.

^x T. Jon. 47. 2 Ld. Raym. ^a Com. Rep. 162. Caf. 1414. 1 Str. 682. S. C. Caf. Pr. C. B. 61. Barnes, 132. Pr. C. B. 157. Pr. Reg. Caf. temp. Hardw. 204. 118. S. C. Barnes, 141. but see 3 Lev. 60. *semb.*

^y Barnes, 129.

contra.

tor or administrator is liable to costs, upon a judgment of *non pros*^b: and where he has *knowingly* brought a wrong action, or otherwise been guilty of a *wilful* default, he shall pay costs upon a discontinuance^c, or for not proceeding to trial according to notice^d; but otherwise he is not liable to costs, in either of these cases^e. Nor, where he merely sues *en autre droit*, is he liable to costs, upon a judgment as in case of a nonsuit^f.

Executors and administrators are liable to costs, when defendants, if they plead falsely^g; and the judgment in such case is, that the costs be levied, of the goods of the testator or intestate, if the defendant hath so much thereof in his hands to be administered, and if not, *de bonis propriis*. A bankrupt sued as executor pleaded a false plea, and it being found against him, the plaintiff had judgment for the costs *de bonis propriis*, after which he obtained his certificate; and the court held,

^b Cal. Pr. C. B. 14, 157,
S. 3 Bur. 1585.

^c Cal. Pr. C. B. 79. 3
Bur. 1451. 1 Blac. Rep.
451. S. C.

^d Cal. Pr. C. B. 158. 3
Bur. 1585.

^e 2 Str. 871. Barnes, 133.

^f 4 Bur. 1927. Say. Costs,
96, 7. S. C.

^g 4 Bur. 1928. Barnes,
130.

^h Cro. Eliz. 503. Plowd.
183. Hut. 69.

that

that this judgment for the costs *de bonis propriis*, was not discharged by the certificate ^b. But where an executor or administrator pleads *plene administravit*, and the plaintiff, admitting the truth of the plea, takes judgment of *assets in futuro*, the defendant is not liable to costs ⁱ. So where an executor or administrator pleads several pleas to the whole declaration, as *non assumpsit* and *plene administravit*, and one of them is found for him, he is entitled to the *postea* and costs, though the other plea be found against him. But if the plaintiff take judgment of *assets in futuro*, upon the plea of *plene administravit*, and go to trial upon the plea of *non assumpsit*, he will be entitled to costs, if he obtain a verdict; and therefore in such case, unless the defendant has a good ground of defence upon *non assumpsit*, it is usual for him to move to withdraw his plea, which the court will permit him to do, upon payment of costs ^k.

^a 3 Bur. 1368. 1 Blac. Rep. 400. S. C. *Ante*, 47.

ⁱ Imp. K. B. 428. where it is said to have been so determined in the Common Pleas; and *Qu.* whether the defendant is liable to costs, where he pleads *plene*

administravit prater, and the plaintiff, admitting the truth of the plea, takes judgment of the assets admitted in part, and for the residue of *assets in futuro*.

^k 2 Blac. Rep. 1275.

There

There being still many cases, in which the defendant was not aided by the provisions of the before-mentioned statutes¹, it was enacted by the statute 4 Jac. I. c. 3. that "if any person shall commence in any court, any action of trespass, *ejectione firmæ*, or any other action whatsoever, wherein the plaintiff or demandant might have costs, in case judgment should be given for him, and the plaintiff shall be nonsuited therein, after the appearance of the defendant, or a verdict shall pass against him by lawful trial, that then the defendant, in every such action, shall have judgment to recover his costs against the plaintiff or demandant, to be assessed and levied in like manner as upon the 23 Hen. VIII. c. 15." By this statute the defendant is entitled to costs, on a nonsuit or verdict, in all cases where the plaintiff would have been entitled to them, if he had obtained judgment, as in *assumpsit*^m, &c. And though the declaration be insufficient, so that the plaintiff could not have had costs thereon, the defendant is nevertheless entitled to costs, for the unjust vexationⁿ. But this

¹ 2 Leon. 9. 3 Leon. 92. 189. 3 Bulst. 248. Hob. Bul. Ni. Pri. 354. 219. Hutt. 16. S. C. Cro.

^m Ante, 633.

ⁿ Moor, 625. 1 Bulst. Jac. 158, 9. *semb. contra.*

statute,

statute, being framed upon the model of the 23 Hen. VIII. c. 15. does not extend, any more than that, to actions brought by executors or administrators^o.

The statutes which have been hitherto mentioned only relate to cases where the plaintiff is nonsuited, or has a verdict against him. But there are other statutes, by which the defendant is entitled to costs upon a *nolle prosequi*, *non pros*, discontinuance, or demurrer.

By the 8 Eliz. c. 2. "upon process issuing out of the court of King's Bench, if the plaintiff do not declare in three days after bail put in, or if after declaration he do not prosecute his suit with effect, but willingly suffer the same to be delayed or discontinued, or he be nonsuited therein, the judges, by their discretions, shall award to the defendant his costs, damages, and charges in that behalf sustained." This statute does not extend, any more than the former, to actions brought by executors and administrators^p, in their representative character. But if the plaintiff enter a *nolle prosequi*, the defendant is entitled to costs upon this statute^q.

^o Gilb. C. P. 271.

Jac. 361.

^p Cro. Eliz. 69. Cro. ^q 3 T. R. 511.

By

By the 13 *Car.* II. stat. 2. c. 2. § 3. it is enacted, that "upon an appearance entered for the defendant, by attorney, of the term wherein the process is returnable, unless the plaintiff shall put into the court, from whence the process issued, his bill or declaration against the defendant, in some personal action, or ejectment of farm, before the end of the term next following after appearance, a nonsuit for want of a declaration may be entered against him; and the defendant shall have judgment, to recover costs against the plaintiff, to be taxed and levied in like manner as upon the 23 *Hen.* VIII. c. 15."

And, still further to discourage the bringing of frivolous and vexatious actions, it is enacted by the statute 8 & 9 *W.* III. c. 11. § 2. that "if any person shall commence or prosecute any action, in any court of record, wherein upon *demurrer*, either by plaintiff or defendant, demandant or tenant, judgment shall be given by the court against the plaintiff or demandant, the defendant or tenant shall have judgment to recover his costs, and have execution for the same by *capias ad satisfaciendum*, *feri facias*, or *elegit*." This statute does not extend to demurrers to pleas in abatement;

ment^r; nor in any action, wherein the defendant would not have been entitled to costs, upon a nonsuit or verdict^s.

The plaintiff, we may remember, is not entitled to costs in a *popular* action, for the whole or part of the penalty, given by statute to a common informer, unless they are expressly given him by the statute^t. Nor was the defendant entitled to costs, in such an action, until the statute 18 *Eliz.* c. 5. § 3. (made perpetual by the 27 *Eliz.* c. 10.) by which it is enacted, that "if any common informer shall willingly delay his suit, or shall discontinue or be nonsuit, or shall have the matter pass against him therein by verdict or judgment in law, the said informer shall pay to the defendant his costs, charges, and damages, to be assigned by the court in which the suit shall be attempted:" with a proviso, that "this act shall not extend to any officer, who, in respect of his office, has heretofore usually sued upon penal laws; nor to any officer, suing only for matters concerning his office^u." This act of parliament, which

^r 1 *Ld. Raym.* 337. 1 ^s *Caf. Pr. C. B.* 25. *Id.*
Salk. 194. 12 *Mod.* 195. 4. *contra.*

Comb. 482. *S. C.* 2 *Ld.* ^t *Ante*, 634.

Raym. 992. 1 *Salk.* 194. ^u 2 *Ld. Raym.* 1333.
 6 *Mod.* 88, *S. C.* *Bul. Ni. Pri.* 334.

seems

seems to give costs upon arrest of judgment ^v; extends to actions brought upon a *subsequent* statute ^w; or one that is *repealed* ^x; and also to actions *qui tam*, for *part* of a penalty, as well as where the *whole* is given to a common informer ^y: but it does not extend to actions, brought by the party grieved, upon a *remedial* statute ^z.

Where there are several defendants, who succeed in the action, the plaintiff may pay costs to which of them he pleases^a: and if they fail, each of them is answerable for the whole costs. Thus, where an ejectment was brought against several defendants, who defended severally, and at the assizes one of them confessed lease entry and ouster, and had a verdict against him, but the others did not confess; the court upon application said, the officer must tax the same costs against all the defendants; and that if the plaintiff, after he had satisfaction against one, should take out execution against another, the latter might apply to the court ^b.

^v Gilb. C. P. 271.

^w 1 Will. 177.

^x Hutt. 35, 6. 2 Keb. 106.

^y Cowp. 366. Say. Costs,

75. S. C.

^z 1 And. 116. 2 Leon.

116. 4 Leon. 55. Cro. Eliz.

177. Hutt. 22. 1 Salk. 30.

^a 1 Str. 516. 2 Str. 1203.

^b Bul. Ni. Pri. 335, 6.

Where

Where one of several defendants lets judgment go by default, and the other pleads a plea which goes to the whole, and shews that the plaintiff had no cause of action, if this plea be found for the defendant who pleaded it, he shall have costs; and being an absolute bar, the other defendant shall have the benefit of it, and shall not pay costs to the plaintiff^c. But where the plea does not go to the whole, but is merely in *discharge* of the party pleading it, there the other party shall not have the benefit of it; but shall pay costs, though it be found against the plaintiff^d.

Before the statute 8 & 9 W. III. c. 11. if one of several defendants had been *acquitted*, he was not entitled to his costs; the courts construing the former acts to relate only to the case of a total acquittal, of all the defendants^e. This being found inconvenient, it was enacted, by the same statute, § 1. that "where se-

^c Co. Lit. 125. Cro. Jac. C. B. 107. Pr. Reg. 102. 134. 1 Lev. 63. 1 Sid. 76. S. C.

1 Keb. 284. S. C. 2 Ld. ^d *Id. ibid.* 1 Will. 89.

Raym. 1372. 1 Str. 610. 3 T. R. 656.

8 Mod. 217. S. C. Cas. Pr. ^e 2 Str. 1005. and see 1 Salk. 194.

veral persons shall be made defendants, to any action of trespass, assault, false imprisonment, or *ejectione firmæ*, and any one or more of them shall be, upon the trial thereof, acquitted by verdict, every person so acquitted shall recover his costs of suit, in like manner as if the verdict had been given against the plaintiff, and acquitted all the defendants; unless the judge, before whom the cause is tried, shall immediately after the trial thereof, in open court, certify upon the record under his hand, that there was a reasonable cause for making such person a defendant." This statute is confined to the particular actions therein mentioned; and does not extend to an action of trespass upon the *case*^f, nor consequently to an action of *trover*^g: neither does it extend to an action of *replevin*^h.

When a *feigned* issue is ordered by a court of *law*, whether it be in a civil or criminal proceeding, the costs always follow the verdict, and must be paid to the party obtaining

^f 2 Str. 1005.

Rep. 355. Say. Costs, 215.

^g Barnes, 139.

S. C.

^h 3 Bur. 1284. 1 Blac.

itⁱ. But when a feigned issue is ordered by a court of *equity*, the costs do not follow the verdict, as a matter of course; but the finding of the jury is returned back to the court which ordered it, and the costs there are in the discretion of the courtⁱ. Where the issue is ordered by a court of law, on a rule for an information^k, or motion for an attachment^l, the costs of the original rule, or motion, do not in general follow the verdict, but only the costs of the feigned issue; which costs are to be reckoned, from the time when the feigned issue was first ordered and agreed to^m. Yet, where it was ordered, by the consent rule, that the costs should abide the event of the issue, the court directed the *whole* costs to be paid under itⁿ.

ⁱ *Still* and *Rogers*, 1 Lil. be prudent in future, when
P. R. 344. *Per Holt*, Ch. J. they permitted such issues to
Barnes, 130. 1 Wilf. 261, be tried, to compel the par-
331. Say. Rep. 24. 1 Wilf. ties to consent, that the costs
324. S. C. but in the should be in the discretion
case of *Hofkins v. Ld. Berke-* of the court.
ley (4 T. R. 402) the court ^k Say. Rep. 229. 1 Bur.
strongly intimated an opi- 603. Say. Costs, 144. S. C.
nion, that as feigned issues ^l Say. Rep. 253.
were only granted with the ^m 1 Bur. 604.
leave of the court, it would ⁿ 2 Bur. 1021.

Having thus shewn, in what cases the parties are entitled to costs, I shall proceed to consider, what costs they are respectively entitled to, and the means of recovering them, first, as between *party* and *party*; and secondly, as between *attorney* and *client*, with the measures to be pursued by the latter for taxing them.

Where the plaintiff recovers *single* damages, he is only entitled to *single* costs; unless more be expressly given him by statute. But if *double* or *treble* damages are given by statute, in a case wherein *single* damages were before recoverable, the plaintiff is entitled to *double* or *treble* costs, although the statute be silent respecting them^o; as in an action upon the 2 Hen. IV. c. 11. &c.^p In some cases, *double* and *treble* costs are expressly given to the plaintiff; as upon the game laws, by the statute 2 Geo. III. c. 19. § 5. And wherever a plaintiff is entitled to *double* or *treble* costs, the costs given by the court *de incremento* are to be doubled or trebled, as well as those given by the jury^q. But double or treble costs are not to be understood to mean, according

^o Say. Costs, 228.

582. 3 Lev. 351. Carth.

^p *Ante*, 633.

297, 321. 2 Str. 1048. but

^q 2 Leon. 52. Cro. Eliz. see 1 T. R. 252.

to their literal import, twice or thrice the amount of single costs. Where a statute gives *double* costs, they are calculated thus : 1. the common costs ; and then *half* the common costs. If *treble* costs, 1. the common costs ; 2. half of these ; and then half of the latter ^r.

Double or treble costs are also in some cases expressly given to the defendant ; as in actions against parish officers, by the 43 *Eliz.* c. 2. § 19 ; against justices of the peace, constables, &c. by the 7 *Jac.* I. c. 5 ; for distresses for rents and services, by the 11 *Geo.* II. c. 19. § 21, 2 ; and against officers of the excise or customs, by the 20 *Geo.* III. c. 70. § 34. and 24 *Geo.* III. sess. 2. c. 47. § 35. In these, and such like cases, where it does not appear, on the face of the record, that the defendant is entitled to the benefit of the act, (as where he pleads the general issue,) and there is no particular mode appointed for recovery of the costs, the proper mode, after a

^r Table of Costs, *in principio*. This table is a valuable acquisition to the profession, as it contains a full collection of bills of costs, accurately drawn, and methodically arranged, by which the practitioner may not only know how to charge for his business, but may see beforehand in what order it is to be conducted.

nonfuit or verdict for the defendant, is to apply to the court, upon an affidavit of the facts, for leave to enter a suggestion on the roll^s. And it cannot be done by rule of court^t, unless where the plaintiff moves for leave to discontinue on payment of costs; in which case, the court may make it part of the rule, that he shall pay double or treble costs^u. But where a particular mode is appointed by statute, for the recovery of double or treble costs, as by the *certificate* of the judge who tried the cause, on the 7 *Jac.* I. c. 5. there that particular mode must be observed^v: so that if the judge certify, there is no need of a suggestion; and if he do not, it is useless, except where judgment goes by default^w.

The means of recovering costs, as between party and party, are by *action* or *execution*, upon a judgment obtained for them; or by *attachment*, upon a rule of court^{*}. Thus, in

^s 1 Str. 49, 50. Cas. Pr. Hardw. 125.
 C. B. 16. Cas. Temp. ^v 2 Vent. 45. Doug.
 Hardw. 125. *Id.* 138. 2 307, 8. but see Doug.
 Str. 1021. S. C. Say. Rep. 308. n.
 214. 3 Will. 442. ^w Cas. Temp. Hardw.
^t 1 Str. 50. 138, 9.
^u 2 Str. 974. Cas. Temp. ^{*} H. Blac. 2 V. 248.

ejectment,

ejectment, where there is a verdict and judgment against the tenant, an action may be brought, or execution taken out thereon, for the costs^{*}: but where the plaintiff is nonsuited, for not confessing lease entry and ouster, the lessor of the plaintiff must proceed by attachment, upon the consent rule[†]. And so where the nominal plaintiff is nonsuited upon the merits, or has a verdict and judgment against him, the only remedy is by attachment, against the lessor of the plaintiff[‡].

In proceeding by *attachment*, a copy of the rule, with the officer's *allocatur* thereon, should be *personally*^a served, on the party liable to the payment of costs; and at the same time, the original rule should be shewn to him^b, and a demand made of the payment of them^c: which demand may be made by the acting attorney in the cause, although he act in the name of another attorney^d. And if the costs be not paid, the court, upon an affidavit of the circumstances, will grant an

^{*} Run. *Eject.* 140, 141. Geo. II.

[†] *Id. ibid.* 1 Salk. 259. Barnes, 182.

[‡] Run. *Eject.* 142, 3. Tilly and Bailly, Mich. 6

^a 3 T. R. 351.

^b *Id. ibid.*

^c Barnes, 120.

^d Say. Rep 95.

attachment. In this court, the rule for an attachment is absolute in the first instance^e; and may be moved for, on the last day of term^f.

To assist the parties in the recovery of costs, they are allowed to deduct or set off the costs in one action against those in another. This practice, however agreeable to natural justice, does not seem to have obtained, till lately, in the court of King's Bench^g: But, in the Common Pleas, it has been frequently allowed; and that, not only where the parties have been the *same*^h, but also where they have been in some measure *different*. Thus, a party has been permitted to set off a *separate* demand, for costs payable to himself *alone*, against a *joint* demand, for costs payable by himself and othersⁱ: and he has also been permitted to set off a *joint* demand, for costs payable to himself and another, against a *separate* demand, for damages and costs payable by himself only^k. But

^e *Per Buller*, Just. M. 24 Rep. 826. Say. Costs, 256. Geo. III. S. C. Bul. *Ni. Pri.* 336.

^f 5 Bur. 2686.

ⁱ Barnes, 146. but see

^g 2 Str. 891, 1203. Bul.

Barnes, 130.

Ni. Pri. 336. 4 T. R. 124.

^k Say. Costs, 254. 2 Blac.

^h Barnes, 145. 2 Blac. Rep. 827. S. C. cited.

where,

where, in an action of trespass against four defendants, the plaintiff obtained a verdict against one, and the other three were acquitted, the court would not suffer the costs of the three defendants, who were acquitted, to be deducted out of the plaintiff's costs, against that defendant who was found guilty; declaring the motion to be unprecedented¹. Where the application is made by the party to whom the *larger* sum is due, the rule is for a stay of proceedings, on acknowledging satisfaction for the *lesser* sum^m. But where the *lesser* sum is due to the party applying, the rule is to have it deducted, and for a stay of proceedings, on payment of the balanceⁿ.

As between *attorney* and *client*, the former may maintain an action against the latter, for the recovery of his costs^o. But, by the stat. 3 Jac. I. c. 7. § 1. "all attornies and solicitors shall give a true bill unto their masters or clients, or their assigns, of all charges concerning the suits which they have for them, subscribed with their hands and names, before

¹ Barnes, 145. Bul. Ni. Pri. 336.

ⁿ Say. Costs, 254. and see 4 T. R. 124.

^m Bul. Ni. Pri. 336.

^o Cro. Car. 159, 160.

such

such time as they or any of them shall charge their clients, with any the same fees or charges." Upon this statute it was a good plea, to an action brought by an attorney for his fees, that no bill had been delivered to the defendant^p; or the statute might have been given in evidence, on *non assumpsit*^q. But if an attorney had delivered his bill to the defendant, after the arrest and before the bill filed, it was well enough^r: and this statute did not extend to attornies in *inferior* courts, but only to those in the courts at *Westminster*^s. It should also seem, that an attorney's bill could not have been taxed, unless an action was depending thereon, nor without bringing the amount of it into court. To remedy these manifold inconveniences, it was enacted, by the statute 2 *Geo. II. c. 23. § 23.* (made perpetual by the 30 *Geo. II. c. 19. § 75.*) that "no attorney of the court of King's Bench, Common Pleas, or Exchequer, &c. nor any *solicitor* in Chancery, &c. shall commence or maintain any action or suit, for

^p 3 *Keb.* 118, 514. *T.* ^r 1 *Lil. P. R.* 145. but see
Raym. 245. 3 *Salk.* 19. *S.* 1 *Str.* 633. *Cal. Pr. C. B.*
C. but see *Carth.* 57. 1 27. *S. C.*
Show. 48. *Comb.* 126. *S.* ^s *Carth.* 147. 1 *Show.* 96.
C. 1 *Salk.* 86. *S. C.*

^q 1 *Show.* 358.

the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month or more, after such attorney or solicitor respectively shall have delivered, unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house, or last place of abode, a bill of such fees, charges, and disbursements¹, written in a common legible hand, and in the *English* tongue, except law terms and names of writs, and in words at length, except times and sums; which bill shall be subscribed, with the proper hand of such attorney or solicitor respectively.

“ And, upon application of the party or parties chargeable by such bill, or of any other person in that behalf authorized, unto the Lord High Chancellor, or master of the rolls, or unto any of the courts aforesaid, or unto a judge or baron of any of the said courts respectively, in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted; and upon the submission of the said party or parties, or such other person authorized as aforesaid, to pay the whole sum, that upon taxation of the said bill shall appear to be due,

¹ Barnes, 243. *Id.* 123.

to the said attorney or solicitor respectively; it shall and may be lawful for the said Lord High Chancellor, Master of the Rolls, or any of the courts aforesaid, or for any judge or baron of any of the said courts respectively, and they are hereby required, to refer the said bill, and the said attorney's or solicitor's demand thereupon, although no action or suit shall be then depending in such court, touching the same, to be taxed and settled by the proper officer of such court, without any money being brought into the said court for that purpose: and if the said attorney or solicitor, or the party or parties chargeable by such bill respectively, having due notice, shall refuse or neglect to attend such taxation, the said officer may proceed to tax the said bill *ex parte*; pending which reference and taxation, no action shall be commenced or prosecuted, touching the said demand.

“ And, upon the taxation and settlement of such bill and demand, the said party or parties shall forthwith pay to the said attorney or solicitor respectively, or to any person by him authorized to receive the same, that shall be present at the said taxation, or otherwise unto such other person or persons, or in such manner, as the respective courts aforesaid shall
direct,

direct, the whole sum that shall be found to be or remain due thereon, which payment shall be a full discharge of the said bill and demand: and in default thereof, the said party or parties shall be liable to an attachment or process of contempt, or to such other proceedings, at the election of the said attorney or solicitor, as such party or parties was or were before liable unto.

“ And if, upon the said taxation and settlement, it shall be found, that such attorney or solicitor shall happen to have been overpaid, then the said attorney or solicitor respectively shall forthwith refund, and pay unto the party or parties entitled thereunto, or to any person by him, her, or them authorized to receive the same, if present at the settling thereof, or otherwise unto such other person or persons, or in such manner, as the respective courts aforeaid shall direct, all such money as the said officer shall certify to have been so overpaid; and in default thereof, the said attorney or solicitor respectively shall, in like manner, be liable to an attachment or process of contempt, or to such other proceedings, at the election of the said party or parties, as he would have been subject unto, if this act had not been made.

“ And

“ And the said respective courts are hereby authorized, to award the *costs* of such taxations to be paid by the parties, according to the event of the taxation of the bill; that is to say, if the bill taxed be less, by a *sixth* part, than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but if it shall not be less, the court, in their discretion, shall charge the attorney or client, in regard to the reasonableness or unreasonableness of such bill.”

But, by the 12 Geo. II. c. 13. § 5. “ it shall and may be lawful to and for every attorney, clerk in court, and solicitor, to write his bill of fees, charges, and disbursements, with such *abbreviations* as are now commonly used in the *English* language; any thing in any former law to the contrary notwithstanding.” And by § 6. “ the said act of the *second* year of his present majesty, for the better regulation of attornies and solicitors, or any clause, matter, or thing therein contained, shall not extend to any bill of fees, charges, and disbursements, due from any attorney or solicitor, to any other attorney or solicitor, or clerk in court; but that every such attorney, solicitor, or clerk in court, may use such remedies

medies for the recovery of his fees, charges, and disbursements, against such other attorney or solicitor, as he might have done before the making of the said act."

Upon the latter clause, there is a case in *Wilson's Reports**, where a judge of this court having made an order, to refer an *agent's* bill to be taxed, and the master not having obeyed it, the court was applied to, and held that the order was irregular; the master declaring, that he had never taxed a bill for agency. But it is now the uniform practice of both courts^v, to refer an agent's bill to be taxed, upon the defendant's bringing into court the sum claimed by the plaintiff. It is not necessary however, that such a bill should be signed, or delivered, before the commencement of an action^w.

If the whole bill be for *conveyancing*^x, it cannot be taxed. But where an attorney had delivered two separate bills, one of which was for fees and disbursements in causes, and the other for making conveyances, a rule was made for taxing both^y. And so, where it

" 1 Will. 266.

* M. 12 Geo. II. *Ann.*

^v Doug. 199, 200. and K. B. Barnes, 141, 2. C. B. the cases there cited *in notis.*

^y Say. Rep. 233. Say.

^w Doug. 199. *in notis.*

Costs, 320. S. C.

was moved, that the master might be directed to tax those articles in an attorney's bill, which related to conveyancing and parliamentary business, the rest being for management of causes in the court of King's Bench, Lord *Mansfield* said, there was no doubt but the master might tax the whole: that he recollected a case, where the fees paid to a proctor, for business done in the ecclesiastical court, made part of the bill; and it was determined, that, as the whole bill had been referred to the master, he might tax that part of it^a. The court will refer an attorney's bill to be taxed, though all the business was done at the quarter sessions^a; and in such case, an action cannot be maintained for the amount of the bill, unless it be signed, and delivered a month before the bringing of the action^b.

It is not necessary for the *executor* or *administrator* of an attorney, to deliver a bill of costs, for business done by his testator or intestate, before the commencement of an action^c; the statute 2 *Geo. II.* c. 23. § 23. being confined to actions brought by the attorney himself, and not extending to his personal

^a Doug. 199. *in notis.*

^b 5 T. R. 694.

^a 4 T. R. 496. but see *Id.*

^c Cas. Pr. C. B. 58.

124. Barnes, 122. *contra.*

represen-

representatives. And, in the court of Common Pleas, they will not suffer such a bill to be taxed^d: but in the court of King's Bench it is otherwise^e; for there, the bill may be referred to be taxed, on the defendant's undertaking to pay what is due. An attorney delivered his bill, and, after his death, application was made to tax it, and above a sixth part was taken off; it was moved that the executrix might pay the costs, but the court held she should not, for the words of the act 2 Geo. II. c. 23. § 23. impose them upon the attorney or solicitor only, and the executrix is not to blame, if she stand upon his bill, or make out one from his books^f.

Before an attorney's bill has been settled and paid, it may be taxed, as a matter of course, at any distance of time^g. But after it has been settled and paid, and the payment has been long acquiesced under, the court will not refer it to be taxed, *as a matter of course*^h. So where a bond had been given for the debt, five years before, and the vouchers had been

^d Barnes, 119, 122.

^e *Per Cur.* T. 34 Geo.

^f 2 Str. 1056. Say. Costs, III.

324, 5. Imp. K. B. 482.

^h Say. Costs, 323. Doug.

ⁱ 2 Str. 1056. Say. Costs, 199.

327.

delivered up, the court would not refer the bill to be taxed, saying, an attorney at this rate could never be safeⁱ. And it is a general rule, that an attorney's bill cannot be taxed, at the trial of an action brought upon it, nor after verdict^k; for if the business was really done, (which must be proved at the trial), the delay of the defendant, for more than a month, in objecting to the *quantum*, is an admission that he thinks it to be reasonable. But though an attorney's bill has been settled and paid, yet the court, *under special circumstances*, will refer it to be taxed; for the client may by affidavit shew, that the business charged was never performed, or that the charges are fraudulent: and where that is the case, neither payment, nor a release, nor a judgment for the money due, will preclude the court from referring the bill to be taxed^l. It may also be taxed, though there was a special agreement, between the attorney and his client, that the former should be paid for his time, at a certain rate by the day, besides his expences^m; or though he has obtained a war-

ⁱ Caf. Pr. C. B. 109. Pr.
Reg. 37. S. C.

^l Say. Costs, 323. Doug.
199. S. P.

^k Doug. 199. K. B.
Barnes, 124. C. B.

^m Say. Costs, 321.

rant of attorney from his client, for confessing judgment for the money due upon his bill, and has entered up judgment thereupon ⁿ.

The statute 2 Geo. II. c. 23. § 23. only requires the delivery of a bill, for the *bringing* of an action; and therefore, though an attorney cannot bring an action on his bill, till it has been delivered a month, that circumstance is not necessary to enable him to *set it off*. But he must not produce it at the trial by surprize. It is sufficient, in such case, to deliver the bill time enough, for the plaintiff to have it taxed before the trial ^o.

If an attorney refuse to deliver a bill to his client, the latter may compel him, by taking out a summons before a judge; and if the attorney, on being served therewith, do not attend, an order will be made for delivering it, within a reasonable time ^p. If he still neglect to deliver it, the order should be made a rule of court; and on serving the same, and making affidavit thereof, the court on motion will grant an attachment ^p. The bill being delivered, the client may apply for a judge's summons, to shew cause, why it should not be referred to the proper officer to be taxed;

ⁿ Say. Costs, 322.

^p Imp. K. B. 479.

^o Doug. 199. *in notis*.

upon which an order will be made, the client undertaking to pay what shall appear to be due upon such taxation^a. If the attorney do not attend, an order will be made of course. But, in the Common Pleas, the client cannot have a summons for delivery of the bill, and taxing it, together^r. It was formerly necessary, in this court, to have three appointments, in case the attorney did not attend, before the master could proceed *ex parte*. But, by a late rule^s, if the party do not attend, the master shall proceed *ex parte* on the first appointment."

If a sixth part of the bill be taken off, the attorney is to pay the costs of taxation; but if less, the costs are in the discretion of the court^t. In the exercise of this discretion, however, the courts are governed by the statute: and accordingly, the costs of taxation have been always reciprocally given to the client or attorney, as a sixth part has, or has not been taken off^u.

To assist the attorney, in recovering his costs, he has a *lien* for the amount of his bill,

^a Imp. K. B. 479, 480. 58c.

^r *Id.* 480. Barnes, 126.

^t See the statute.

C. B.

^u Barnes, 118, 147, 8.

^s H. 32 Geo. III. 4 T. R.

upon

upon the deeds, papers, and writings in his hands, belonging to his client^v: and until that be paid, the court will not order them to be delivered up^w. Nor can an attorney be *changed* by his client, without leave of the court, or order of a judge, on payment of his bill, to be taxed by the proper officer^x. An attorney has also a *lien*, on the money recovered by his client, for his bill of costs^y. If the money come to his hands, he may retain it, to the amount of his bill: he may stop it *in transitu*, if he can lay hold of it: if he apply to the court, they will prevent its being paid over, till his demand is satisfied^z. And Lord *Mansfield* declared he was inclined to go still further, and to hold, that if the attorney give notice to the defendant, not to pay the money recovered by his client, till his bill be satisfied, a payment by the defendant, after such notice, would be in his own wrong, and like paying a debt which has been assigned, after notice^a. So, in a late case^b, where the defendant applied to set off the debt and costs in one action, against those in another, the

^v 4 T. R. 124. Doug. 217.

104, 5. but see *Id.* 197. n.

^w 1 Lil. P. R. 142. 3 T.

R. 275.

^x 1 Lil. P. R. 141. Doug.

^y 4 T. R. 124.

^z Doug. 100, 101.

^a *Id.* 226, 7.

^b 4 T. R. 123, 4.

court would not suffer it to be done, until the attorney's bill was first discharged. But the court will not go beyond these limits. And therefore where the defendant, not having had any notice to the contrary, compromised the debt and costs with the plaintiff, before his attorney had been paid, the court would not oblige the defendant to pay him^c.

When the costs are taxed, judgment is said to be *signed*, and execution may be immediately taken out, against the defendant's person or goods; but in order to charge him in execution, or bind his lands, or to proceed against him by action of debt or *scire facias* on the judgment, or against his bail on their recognizance, or if a writ of error be brought, it is necessary that the judgment should be *entered* of record, and docketed, and the judgment-roll carried to, and filed in the treasury of the court.

The judgment, after verdict, &c. is entered on the issue-roll, which from thenceforth is called the judgment-roll; and if the roll has already been carried in, which seldom happens but where the plaintiff has been ruled to enter the issue, the *postea* is taken, with the master's *al-*

^c Doug. 226.

locatur, to the treasury at *Westminster*, and the clerk of the treasury continues the proceedings, and enters the judgment. But if, as is more frequently the case, an *incipitur* only is made on the issue-roll, at the time of passing the record of *nisi prius*, the whole proceedings are to be entered, beginning with the warrants of attorney. The proceedings are continued on the issue-roll, after the award of the *venire facias*, by the following entry : *Afterwards the process thereof is continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them, before our lord the king at Westminster, or (by original,) wheresoever, &c. until [the return of the distringas] unless, &c. [as in the jurata] according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear : At which day before our said lord the king at Westminster, comes the said (plaintiff) by his said attorney, and the said chief justice [or justices of assize] before whom the said issue was tried, sent hither his [or their] record, had in these words, to wit, [Then follows a copy of the postea, from the nisi prius record, and afterwards the final judgment.]*

These entries were formerly made by the clerks of the chief clerk ^d, who were called *entering* clerks; but they are now made by the *attornies*, and ought to be written in a full fair hand, with a large margin, of an inch at least, and a convenient distance at the top, for binding up the same, and at the bottom, that the writing be not rubbed out ^e. In this manner, the proceedings may be entered on both sides of the roll, beginning on the back, over against the first line of the first warrant of attorney ^f, and taking care to leave a sufficient space at the end, for the *committitur*, and entry of satisfaction, &c.

At common law, the death of a *sole* plaintiff or defendant, before final judgment, would have abated the suit: but if either party had died in vacation, judgment might have been entered that vacation, as of the preceding term, and it would have been a good judgment at common law as of the preceding term; though it be not so upon the statute of frauds, in respect of purchasers, but from the

^d R. M. 1654. § 14. R.
T. 1 Jac. 2. R. M. 5 Ann.

^e R. H. 1657. *Ante*, 472.

^f Imp. K. B. 361.

signing.

signing^g. And if either party die, after a special verdict, and pending the time taken for argument or advising thereon, or on a demurrer, motion in arrest of judgment, or for a new trial, judgment may be entered, at common law, after his death, as of the term in which the *postea* was returnable, or judgment would otherwise have been given, *nunc pro tunc*^h; that the delay arising from the act of the court, may not turn to the prejudice of the party. This however is discretionary in the court; and being a matter of indulgence, they have sometimes refused to allow it, after a considerable lapse of time, where the delay has been owing to the plaintiff or his attorneyⁱ. It has also been refused, in an action of debt on judgment, where the proceedings were stayed pending a writ of error, and the plaintiff died before the affirmance of the judgment^k. And, in general, it should seem, that if there be a rule for judgment, and it be

^g 1 Salk. 87. 3 Salk. 116. 92. 1 Sid. 462. 1 Vent. 58,
2 Ld. Raym. 766, 849. 90. S. C. 10 Mod. 30, 325.
7 Mod. 2, 93. S. C. 3 Salk. 1 Str. 427. 1 Bur. 147, 226.
159. 2 Salk. 401. 7 Mod. 4 Bur. 2277. Barnes, 255,
39. S. C. 6 Mod. 191. 261.
3 P. Wms. 399. Barnes, ⁱ 1 Str. 639. Barnes,
266. 262. see also 6 Mod. 191.

^h 1 Leon. 187. Latch,

^k 1 T. R. 637.

not entered for many years, the court will not suffer it to be entered, without examining how it came not to be entered before ¹.

Where either party dies, between the verdict and the judgment, it is enacted, by the statute 17 Car. II. c. 8. "that his death shall not be alledged for error, so as the judgment be entered within two terms after the verdict." In the construction of this statute, it has been holden, that the death of either party before the assizes is not remedied: but if the party die after the assizes begin, though before the trial, that is within the remedy of the statute; for the assizes are considered but as one day in law, and this is a remedial act, which shall be construed favourably ^m. The judgment upon this statute is entered by or against the party, as though he were alive ⁿ; and it should be entered, or at least signed ^o, within two terms after the verdict. But there must be a *scire facias* to revive it, before execution can be taken out ^p; and such *scire facias*, pursuing the form of the judgment, should be general, as on a judgment recovered by or against the party himself ^q.

¹ 6 Mod. 59.

^o 1 Sid. 385. Barnes,

^m 1 Salk. 8. and see 2 261.

Ld. Raym. 415. *in notis*.

^p 1 Will. 302.

ⁿ 1 Salk. 42.

^q 2 Ld. Raym. 1280.

By a subsequent statute^r, it is enacted,
“ that in all actions to be commenced in any
“ court of record, if the plaintiff or defendant
“ happen to die, after interlocutory and be-
“ fore final judgment, the action shall not
“ abate by reason thereof, if such action
“ might have been originally prosecuted or
“ maintained, by or against the executors or
“ administrators of the party dying; but
“ the plaintiff, or, if he be dead after such in-
“ terlocutory judgment, his executors or ad-
“ ministrators, shall and may have a *scire facias*
“ against the defendant, if living after such in-
“ terlocutory judgment, or, if he died after,
“ then against his executors or administrators,
“ to shew cause, why damages in such action
“ should not be assessed and recovered by
“ him or them. And if such defendant, his
“ executors or administrators, shall appear at
“ the return of such writ, and not shew or
“ alledge any matter sufficient to arrest the
“ final judgment, or being returned warned,
“ or, upon two writs of *scire facias*, it being
“ returned that the defendant, his executors
“ or administrators, had nothing whereby to
“ be summoned, or could not be found in
“ the county, shall make default, that there-

^r Stat. 8 & 9 W. III. c. 11. § 6.

“ upon

“ upon a writ of inquiry of damages shall
 “ be awarded ; which being executed and re-
 “ turned, judgment final shall be given for the
 “ said plaintiff, his executors or admini-
 “ strators, prosecuting such writ or writs of
 “ *scire facias*, against such defendant, his ex-
 “ ecutors or administrators, respectively.”
 This statute has been held not to extend to
 cases, where the party dies before interlocu-
 tory judgment ; though it be after the expira-
 tion of the rule to plead^s.

Where either party dies, after interlocutory
 judgment, and before the execution of the
 writ of inquiry, the *scire facias* upon this sta-
 tute ought to be for the defendant, or his
 executors or administrators, to shew cause
 why the damages should not be *assessed* and
 recovered against them^t, and to hear the
 judgment of the court thereupon^u. But
 where the death happens after the writ of in-
 quiry is executed, and before the return, the
scire facias must be to shew cause, why the
 damages assessed by the jury should not be
adjudged to the plaintiff, or his executors or
 administrators^v. And where the plaintiff

^s 1 Will. 315.

^t Lil. Ent. 647.

^u 6 Mod. 144.

^v 1 Will. 243. and see
 1 T. R. 388.

dies

dies after interlocutory and before final judgment, in an action against an executor, the defendant cannot plead to the *scire facias* a judgment upon bond against his testator, and no assets *ultra*; for the statute never intended, that the executor should be in a better situation, as to the assessing of damages upon the inquiry, than his testator, who could have pleaded nothing but a release, or other matter in bar, arising *puis darrein continuance* ^w.

The judgment upon this statute is not entered by or against the party himself, as upon the 17 *Car. II.* but by or against his executors or administrators ^{*}. And where the defendant dies, after interlocutory and before final judgment, two writs of *scire facias* must be sued out by the plaintiff, before he can have execution; one before the final judgment is signed, in order to make the executors or administrators parties to the record; the other after final judgment is signed, in order to give them an opportunity of pleading no assets, or any other matter, in their defence: for it would be unreasonable that the executors or administrators should be in a worse situation, where their testator or intestate died before the

^w 1 Salk. 315. 6 Mod. 142. S. C. ^{*} 1 Salk. 42.

final judgment was signed, than they would have been in, if he had died afterwards ¹.

If there be two or more plaintiffs or defendants, and one or more of them dies, if the cause of action survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed, at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants ². And if the plaintiff become bankrupt, after interlocutory judgment, his assignees may proceed to final judgment ³, and execution ⁴, in the bankrupt's name, without a *scire facias*.

The judgment, by general intendment of law, has relation to the first day of the term whereof it is entered ⁵, unless any thing appears on the record, shewing that it cannot have that relation ⁶; and, as against the defendant

¹ Say. Rep. 266.

² Stat. 8 & 9 W. III. c. 11. § 7.

³ 2 Will. 358, 374, 378.

⁴ 3 T. R. 437. but note, there was a *scire facias* after judgment, to warrant execution, in the cases of *Gibbins & others v. Mantle*,

² Will. 372, 378. and *Winter & others v. Kretzman*, 2 T. R. 45. and see

¹ Mod. 93. ¹ Vent. 173.

S. C. 5 Mod. 58. ¹ T. R. 463.

⁵ 1 Will. 39.

⁶ 5 Bur. 1556.

and

and his heirs, it binds a moiety of all the *freehold* lands and tenements^e, which he, or any person or persons in *trust* for him^f, was or were seised of, at or after the time to which the judgment relates. And a court of equity will not oblige a judgment creditor to wait, till he is paid out of the rents; but will accelerate the payment, by directing a sale of the moiety^g. Where there is a *term* attendant on the inheritance, a judgment is an equitable lien on the inheritance, and consequently affects the term^h; but generally speaking, a judgment does not bind *leasehold* property, which is only affected by the writ of executionⁱ, and, as against purchasers, by the delivery of it to the sheriff^k.

As to *freehold* lands, they are bound from the time of the judgment, so that execution may be had of these, though the party alien *bond fide* before execution sued out: So, of statutes-merchant, staple, and recognizances, which also bind the land, from the time of entering into them^l. Therefore, if a man

^e Stat. Westm. 2. (13 Ed. I) c. 18.

^f Stat. 29 Car. II. c. 3. § 10. 2 Vern. 248.

^g 2 Ark. 610. An. Ab. 17. S. C.

^h 2 Vern. 535.

ⁱ Godb. 161. 8 Co. 171.

^j Nelf. Abr. 783.

^k Stat. 29 Car. II. c. 3. § 16.

^l 2 Bac. Abr. 363. 3 Co. 14.

has a judgment for debt, or is conusee of a statute, and the debtor, before execution sued, aliens by fine, and five years pass, yet the plaintiff may still sue out execution^m. But if one article to buy an estate, and pay the purchase money, and afterwards the vendor acknowledges a judgment or statute to a third person, who had no notice, yet this judgment shall not in equity affect the estate; because from the time of the articles, and payment of the money, the vendor was only a trustee for the purchaserⁿ. In such case however it must be understood, that the consideration paid is somewhat adequate to the thing purchased; for if the money be but a small sum, in respect of the value of the land, this shall not prevail over a mesne judgment creditor^o. And a mortgagee for a valuable consideration, and without notice^p of such a covenant, shall hold place against the covenantee; for in this case, the money is lent upon the title and credit of

^m 1 Chan. Caf. 268. 1 was held, by Lord Chancellor *Talbot*, not to amount to constructive notice; for

ⁿ 1 P. Wms. 278. 10 Mod. 468. 2 Eq. Caf. judgments, he said, are infinite. 2 Eq. Caf. Abr. 683.

^o 1 P. Wms. 282.

682. but see Amb. 680.

^p Docketting a judgment

the estate, and attaches upon the land; but it is not so in the case of a judgment creditor, who (for aught appears) might have taken out execution against the person, or goods of the party that gave the judgment; and a judgment is only a general security, not a specific lien upon the land^a.

On a judgment against *A.* upon his own bond, a moiety only of his freehold property can be taken, in the hands of his heir^b. But if a judgment be obtained against an heir, on the obligation of his ancestor, the plaintiff is entitled to the whole of the property, which he had by descent, at the time of issuing the original writ^c, or filing the bill^d. A bond therefore is, in some cases, a preferable security to a judgment. If *A.* and *B.* recover several judgments against *C.* and *A.* sue out an *elegit*, and have a moiety of *C.*'s lands delivered to him, and then *B.* sue out an *elegit*, the sheriff can only extend a moiety of the remaining lands^e. But if *A.* has two judgments against *C.* and in the same term takes

^a 1 P. Wms. 279.

609, 10. Amb. 16, 17.

^b Dyer, 271. a. Carth. S. C.

107. 3 Bac. Abr. 25.

^c Carth. 245.^d Plowd. 441. Co. Lit.^e Cro. Eliz. 483. 2 Bac.

102. a. b. 3 Co. 12. a. 2 Atk. Abr. 350. Gilb. Exec. 55, 6.

out two *elegits*, on the one he may have a moiety of the whole, and on the other the other moiety, and is not restrained on the latter to a moiety of the moiety; for, in judgment of law, the whole term is but as one day^v. On lending money therefore, if the lender take two several bonds and warrants of attorney, one for a part, and the other for the residue of the money, and enter up two several judgments thereon, of the same term, he may take the whole of the defendant's lands under them^w.

A. a trader, seised of lands in fee, gives a judgment to *B.* and then, in consideration of 5000 *l.* paid down, and 650 *l.* to be paid at *Christmas*, articles to sell the lands to *C.* and let him into possession at *Michaelmas*, and afterwards becomes bankrupt, the judgment not being served and executed, the plaintiff shall only come in *pro rata* with the rest of the creditors; the words of the statute 21 *Jac.* I. c. 19. § 9. being full and plain, that all the creditors of a bankrupt, unless there is a mortgage, shall be equally paid^x. But if *A.* a trader confesses judgment to *B.* and then sells and conveys the land, for a valuable conside-

^v Hardr. 23.

^x 1 P. Wms. 737, 739.

^w Gilb. Exec. 56.

ration,

ration, to C. and afterwards becomes bankrupt, it seems that the judgment creditor shall extend the land, in the hands of C. who bought prior to the bankruptcy. A creditor by statute of J. S. who becomes bankrupt, before the statute is sued and executed, shall come in only *pro rata*, though there were lands bound by the statute¹.

The relation of judgments to the first day of the term, is taken away, as against purchasers, by the statute of frauds and perjuries²; by which it is enacted, "that the judge or
" officer who shall sign any judgments, shall,
" at the signing of the same, set down the day
" of the month and year of his so doing, upon
" the paper book, docket or record which
" he shall sign; which day of the month and
" year shall be also entered, upon the mar-
" gent of the roll of the record, where the
" said judgment shall be entered. And such
" judgments, as against purchasers *bonâ fide*,
" for valuable consideration, of lands, tene-
" ments or hereditaments to be charged
" thereby, shall in consideration of law be
" judgments only from such time as they

¹ 1 P. Wms. 92.

and the counties *Palatine*,

² 29 Car. II. c. 3. § 14, by the 8 Geo. I. c. 25. § 6.

15. extended to *Wales*,

“ shall be so signed, and shall not relate to the
 “ first day of the term whereof they are en-
 “ tered, or the day of the return of the origi-
 “ nal, or filing the bail.”

This statute is confined to *purchasers*; and does not apply, as between the parties to the suit. Therefore if the defendant die in vacation, judgment may still be entered, after his death, as of the preceding term, when he was living; and it will be a good judgment, at common law, as of that term^a: but then, the roll ought to be brought in and filed, before the effoign day of the subsequent term^b. And it is said, that if judgment be signed in term time, and in the subsequent vacation the defendant sells lands, and before the effoign day of the next term the plaintiff enters his judgment, it shall affect the lands in the hands of the purchaser^c.

The operation of judgments, upon purchasers and mortgagees, is still further limited and restrained by the 4 & 5 *W. & M. c. 20*.

^a 1 Salk. 87. 3 Salk. 116. 2 Ld. Raym. 766. 849. 7 Mod. 2, 93. S. C. 2 Salk. 401. 7 Mod. 39. S. C. 3 Salk. 159. 3 P. Wms. 399.

^b 1 Salk. 87. 2 Ld. Raym. 850. 6 Mod. 191.

^c 6 Mod. 191. *Tamen* *Qu.* if the judgment be not docketted, at the time of the sale.

§ 3. by which it is enacted, "that no judgment not doggetted and entered, according to that act, shall affect any lands or tenements, as to purchasers or mortgagees, or have any preference against heirs, executors or administrators, in their administration of their ancestors, testators, or intestates effects."

The *dogget*, or as it is commonly called the *docket* or *docquet*, is an *index* to the judgment, invented by the courts for their own ease, and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large^d. The practice of docketting judgments seems to have first obtained in the court of Common Pleas, where the dockets were formerly entered on a separate roll, called the docket-roll or common docket, which was of so high an authority, as even to warrant an amendment of the judgment itself^e. But in this court, the docket was originally nothing more than a note, in parchment or paper, containing the christian and surnames of the plaintiff and defendant, the debt and damages recovered, with the term and number of the judgment-roll^f. By a

^d Gilb. C. P. 164, 5. Cro. Car. 574.

^e T. Raym. 39. Sid. 70. ^f R. E. 17 Jac. 1.

subsequent regulation, the defendants' names were required to be entered (alphabetically) in such docket^s. And at length, by the statute 4 & 5 *W. & M.* c. 20. § 2. it was enacted, "that the clerk of the effoins of the
 " court of Common Pleas, and the clerk of the
 " doggets of the court of King's Bench, &c:
 " shall make an alphabetical dogget, by the
 " defendants' names, of all the judgments entered in their respective courts, of *Michael-*
 " *mas* and *Hilary* terms, before the last day of
 " the ensuing terms; and of the judgments of
 " *Easter* and *Trinity* terms, before the last day
 " of *Michaelmas* term; under the penalty of
 " 100 *l.*: which dogget shall contain the
 " names of the plaintiff and defendant, with
 " the addition of the latter, the debt, damages
 " and costs recovered, the venue, and number
 " of the judgment-roll; and shall be fairly
 " put into and kept in books in parchment,
 " to be searched and viewed by all persons,
 " at reasonable times, paying for every term's
 " search 4 *d.* and no more." This statute did not supersede the former practice, of docketting the judgment in parchment or paper, which is still necessary to be done by the attornies, on entering and bringing in their

3 R. E. 1657.

rolls;

rolls; but was intended to operate, in addition to that practice, by requiring the dockets to be entered in alphabetical order, by the officers of the court. Before the making of this statute, the judgment bound the lands, and the docket was nothing more than an index, to find it readily ^h. But now it is deemed necessary, that the judgment should be docketted, in order to bind the lands: and if it be not docketted ⁱ, or if there be a false docket, which is as none ^j, though a right judgment, the purchaser or mortgagee will be safe; and in the latter case, the party grieved must take his remedy against the attorney or officer, for not docketting it truly.

But though the judgment be not docketted, yet under particular circumstances, a purchaser with notice may be affected by it, in a court of equity. Thus where a bill was filed, to have satisfaction of a judgment, against a purchaser of the equity of redemption of land, or to redeem incumbrances, &c. and it appeared, that the purchase was made in 1718, and the judgment not docketted till 1721; the defendant insisted on the statute 4 & 5

^h Gilb. C. P. 165.

^j 1 Bac. Abr. 105. Gilb.

ⁱ 1 Str. 639. and see C. P. 165. 1 Will. 61. 2 Barnes, 261, 2.

Str. 1209. S. C.

W. & M. c. 20. On the other hand, it was contended, that the defendant the purchaser had notice of this judgment, and an allowance for it in the purchase, and that raised an equity for the plaintiff against him. By Lord Chancellor *Macclesfield*, it is plain the defendant had notice of the judgment, and did not pay the value of the estate, and that is a strong presumption of an agreement to pay off the judgment; and since the plaintiff cannot proceed at law against the defendant upon the judgment, for want of docketting it in due time, he ought to be relieved in a court of equity. Decreed, that the defendant pay to the plaintiff, the money *bonâ fide* due upon the judgment^k.

The judgment is docketted, at the time of bringing in the roll or entering it thereon, if already brought in. And the rule, with regard to bringing in rolls, is that every attorney ought to bring them into the office, fairly engrossed, by the following times, (that is to say) the rolls of *Trinity, Michaelmas* and *Hi-*

^k 7 Vin. Abr. p. 53. 2 that a judgment shall not
Eq. Caf. Abr. 684. but see bind lands, without being
7 Vin. Abr. p. 54. where it docketted, notice to the pur-
is said, that the statute be- chafer or no notice, is im-
ing express and positive, material.

lary terms, before the *essoign* day of every subsequent term, and the rolls of *Easter* term, before the first day of *Trinity* term¹. And formerly, no roll could have been brought in and filed, with a *post terminum*, without leave of the court^m. But, in order to accommodate the attornies, the *custos brevium* now usually attends, the day but one before every term, to receive and file their rollsⁿ. And a roll may now be had of a preceding term, as a matter of course, by applying to the clerk of the treasury, and paying a *post terminum*; which roll may be docketted and filed, on paying some small additional fees, to the officers of the court^o.

If an attorney neglect to enter and docket the judgment in due time, by which a loss arises to his client, it seems that he is liable to an action^p: and Lord *Mansfield* intimated, that it very much concerned the chief clerk, to take care that judgments be actually entered up on the roll in due time, and docketted: for that, after he has received his fees for

¹ R. E. 5 W. & M. M. ⁿ R. E. 9 W. III. (a).
9 W. III. T. 10 W. III. Sellon, 535.

^m R. E. 9 W. III. 1 Salk. ^o Imp. K. B. 363.

87. 2 Ld. Raym. 850. ^p 1 Str. 639.

6 Mod. 191.

making such entry, he would be liable to an action upon the case, to be brought by a purchaser, who should have become liable to it, and had searched the roll, without finding it entered up. And he said, that the attorney who had undertaken to do this, and neglected it, would be liable indeed to the chief clerk: but still the chief clerk would be liable to the purchaser, who had suffered by this neglect^a.

There is still another circumstance, necessary to give effect to the judgment, as against purchasers and mortgagees of lands in *Middlesex* and *Yorkshire*; namely, that it should be *registered*: for by the 5 *Ann.* c. 18. § 4. and several subsequent statutes^b, “no judgment, statute or recognizance, (other than such as shall be entered into, in the name and upon the proper account of his majesty) shall affect or bind any manors, lands, tenements or hereditaments, in those counties, but only from the time that a memorial of such judgment, statute or recognizance, shall be entered at the register-office, in such manner as therein is directed.”

^a 2 Bur. 722.

7 *Ann.* c. 20. § 18. 8 *Geo.*

^b 6 *Ann.* c. 35. § 19. II. c. 6. § 1 & 18.

During

During the same term, in which the judgment is given, it is amendable, at common law, in form or in substance^s; but after that term, it is amendable no further than is allowed by the statutes of amendments^t. Upon these statutes, it has been holden, that if there be any thing to amend by, the judgment may be amended in point of form, for the misprision of the clerk^u; and it is amendable by the verdict^v. The want of a *capiatur* or *misericordia*, or the substitution of one for the other, is aided by the statutes of jeofails^w, which have been construed to extend to the addition of a *capiatur*, where none lies^x: and the loss of the judgment-roll, may be supplied by a new entry^y.

^s 8 Co. 157. Gilb. C. P. ^v 2 Str. 787. *Ante*, 455.
108. ^w 16 & 17 Car. II. c. 8.

^t 1 Wilf. 61. 2 Str. 1209. 4 Ann. c. 16. § 2.
S. C. 4 Bur. 1988. ^x 1 Str. 313.

^u 2 Str. 1132, 1156, 1182. ^y 1 Str. 141. 2 Str. 833.
5 Bur. 2730. 3 T. R. 349. 2 Bur. 722.

C H A P. XLI.

Of Execution.

AFTER judgment *signed*, the plaintiff may *immediately*, and before it is *entered*^a, either bring an action of *debt* on the judgment; or if no writ of error be depending, or agreement to the contrary^b, he may, within a year after the judgment, take out execution against the body, lands, or goods of the defendant: but where the plaintiff brings an action of *debt* on the judgment, he cannot take out execution, until he has discontinued the action^c.

A writ of error sued out *after* final judgment, and before execution executed, is generally speaking a *superfedeas* or stay of execution, from the time of the allowance; and that is notice of itself^d: or if the defendant have notice before allowance, of the writ of error being sued out and delivered to the clerk

^a Gilb. C. P. 24. Law of Executions, 43.

^b 1 Mod. 20. *Ante*, 307, 3.

^c Barnes, 208.

^d 1 Salk. 321. 1 T. R. 280. but in order to bring the attorney into contempt, he must have had actual notice. *Id. ibid.* 1 Bur. 340. of

of the errors, it is from the time of that notice a *supersedeas*^c. And a writ of error is so absolutely a *supersedeas*, that after it is allowed, the plaintiff cannot take out a *capias ad satisfaciendum* against the principal, and get it returned *non est inventus*, in order to proceed against the bail^f; nor if the *capias ad satisfaciendum* be sued out before, can the plaintiff call for a return of it, after the allowance of a writ of error^g, even though it has previously lain four days in the office^h: but in such case, the *capias ad satisfaciendum* may be returned, so as to fix the bail, after the writ of error is determinedⁱ.

A writ of error, sued out *before* final judgment, continues in force during the whole term in which it is returnable^k; and if final judgment be signed at any time during that term, it is a *supersedeas* of execution, from the time of signing final judgment^l, provided special bail be put in within four *clear* days after final judgment is signed^m. And the court have gone so far, that if a writ of error

^c 1 Salk. 321. 1 T. R.
220. Say. Rep. 51.

^f 2 Str. 867. 2 Ld. Raym.
1567. S. C.

^g 2 Str. 1186. 1 Willf.
16. S. C.

^h 3 T. R. 390.

ⁱ 1 Willf. 269.

^k Barnes, 196, 7, 8.

^l 1 Str. 632.

^m 2 Str. 781. 1 T. R.
279. 4 T. R. 121.

be sued out, and the plaintiff will not sign final judgment, till a subsequent term after the return of the writ, in order to avoid the effect of it, and then sues out execution, the court will set the execution aside^a. If the defendant bring a writ of error, and the plaintiff, as he may, bring an action on the judgment, and recover, he cannot sue out execution on the second judgment, till the writ of error be determined^b. But where it is apparent to the court, that a writ of error is brought against good faith^c, or for the mere purpose of delay^d, or it is returnable of a term previous to the signing of final judgment^e, or special bail when requisite is not put in and perfected in due time^f, it is not a *superfedeas*.

An execution being an entire thing, cannot be superseded after it is once begun: therefore if a writ of execution be executed, before a writ of error allowed or notice, it may be returned afterwards; and the utmost length of time the law allows for executing a writ, is the day whereon it is returnable, and it is not executable any longer that day than

^a 1 T. R. 280.

^b 2 T. R. 183.

^c 3 T. R. 643. 4 Bur.

^d 4 T. R. 436.

2454. S. P. but see Barnes,

^e Barnes, 197, 8.

202, 3. *semb. contra*.

^f 2 T. R. 44.

the court sits : So long as it is executable, but not executed, the allowance of a writ of error is a *superfedeas*, but not afterwards¹. Judgment in a cause was signed on the 30th of *April*, and the plaintiff on that day sued out a writ of *feri facias* ; afterwards a writ of error was allowed, and served on the agent in town on the 3d of *May*, and on the plaintiff's attorney in the country, and under-sheriff, on the 5th of *May* ; the sheriff entered on the same day, but after notice of the allowance of the writ of error. No bail in error was put in ; and the court upon that ground held, that the writ of error became an absolute nullity, and was no *superfedeas* or stay of execution : but they said, that if the writ of error had been followed up immediately, by the plaintiff in error regularly putting in bail, it would have operated as a *superfedeas*. The party therefore taking out execution, after the allowance of a writ of error, and before bail put in, does it at his peril ; for if the writ of error be regularly followed up, the execution will be set aside².

After affirmance, a writ of error *coram vobis* is not a *superfedeas* without motion³ ; and

¹ 1 Salk. 321. and see 1 Vent. 255.

² 2 T. R. 45.

³ 2 Str. 949.

it seems, that after the allowance thereof, execution may be taken out by leave of the court^w. So, after a writ of error is nonproffed, the court on motion will give leave to take out execution, though a second writ of error is brought^x. Where a writ of error determines in the Exchequer Chamber, by abatement or discontinuance, the judgment is not again in this court, till there be a *remittitur* entered: for without a *remittitur*, it cannot appear to this court, but that the writ of error is still pending in the Exchequer Chamber^y; and therefore in such case, it is usual for the plaintiff to move the court, on an affidavit of the fact, for leave to enter a *remittitur*, and take out execution^z. So, if the plaintiff recover a judgment against two defendants in this court, and one of them bring a writ of error in the Exchequer Chamber, the plaintiff cannot charge the other defendant in execution, till the record be remitted; notwithstanding the writ of error might have been quashed immediately, because not brought by both the defendants^a. Where

^w Say. Rep. 166.

^z 1 Salk. 265. 1 Crompt.

^x 1 Crompt. 350.

369, 70.

^y 1 Salk. 261, 319. 1

2 T. R. 737.

Ld. Raym. 244. S. C.

by reason of variance, the record is not removed, the plaintiff, it is said, need not move the court for leave to take out execution ^b.

Besides the cases that have been mentioned, there are some others, in which executions cannot be taken out without leave of the court; as where, in actions on a policy of assurance, there is a verdict for the plaintiff against one of several under-writers, and the rest have entered into the *consolidation* rule, and agreed to be bound by it^c; or where, upon a reference to arbitration, it is agreed that a verdict shall be taken for the plaintiff's security, and an award is afterwards made in his favour^d. So where, in *ejectment*, the landlord is admitted to defend on the tenant's non-appearance, and judgment is thereupon signed against the casual ejector, with a stay of execution till further order, the lessor of the plaintiff, having succeeded, must apply to the court for leave to take out execution; and in such case, if a writ of error be brought by the landlord, it may be shewn for cause, and will be a sufficient reason, against taking out execution^e: but if the landlord omit the opportu-

^b 1 Salk. 265.

Ante, 550, 51.

^c *Ante*, 257, 368.

^e 2 Str. 1241.

^d 1 Salk. 84. Barnes, 58.

nity of shewing it for cause, the execution is regular, and cannot be set aside^f. It also seems to be proper, where there has been already an execution, in an action of *debt* on bond, for the payment of an annuity, to apply to the court for leave to take out another execution, for subsequent arrears^g.

After a year, from the day of signing final judgment^h, the plaintiff cannot in general take out execution, without a *scire facias*; but where a writ of execution is taken out within the year, and not executed, a new writ of execution may be sued out at any time afterwards, without a *scire facias*, provided the first writ be returned, and continuances entered from the time of issuing itⁱ; which continuances may be entered after the issuing of the second writ, unless a rule be made upon motion, for the proceedings to remain *in statu quo*. So, if the plaintiff has judgment, with a *cesset executio*, or stay of execution for a year, he may after the year take out execution, without a *scire facias*^k; because the delay is by

^f 2 Bur. 757.

1 Sid. 59. 1 Keb. 159. S.

^g 2 Blac. Rep. 843, 1111.

C. Carth. 283. Comb. 1

^h 1 Str. 301. Barnes, 197.

232. S. C. 1 Str. 100.

and see 6 Mod. 14.

^k 6 Mod. 288. 1 Salk.

ⁱ Co. Lit. 290. b. 2

322. S. C.

Inst. 471. 2 Leon. 77, 8.

consent

consent of parties, and in favour of the defendant; and the indulgence of the plaintiff ought not to be turned to his prejudice. But if the plaintiff do not take out execution, within a year after the *cesset executio* is determined, he must first sue out a *scire facias*¹.

So if the defendant bring a writ of error, and thereby hinder the plaintiff from taking out execution, within the year, and the judgment be affirmed, the plaintiff in error nonsuited, or the writ of error discontinued, the defendant in error may proceed to execution after the year, without a *scire facias*^m; because the writ of error was a *superfedeas* to the execution, and the defendant in error must wait till it be determined. It has even been holden, in one caseⁿ, that if a writ of error be brought after the year is elapsed, and thereupon the former judgment is affirmed, such affirmance will revive the former judgment, and enable the party to take out execution without a *scire facias*. But from this case it seems, that if the plaintiff in error be nonsuited, or the writ of error discontinued, there

¹ 2 Crompt. 102.

¹ Salk. 322. S. C.

^m 2 Inst. 471. 5 Co. 88.

ⁿ 1 Rol. Rep. 104. Cro.

Cro. Eliz. 416. 6 Mod. 288. Jac. 364. S. C.

can be no execution of the former judgment, without a *scire facias*.

It was formerly holden, that if the plaintiff were restrained by *injunction* out of Chancery for a year, he could not take out execution afterwards, without a *scire facias*^o; because the courts of law do not take notice of Chancery injunctions, as they do of writs of error: besides, it might be no breach of the injunction, to take out execution within the year, and continue it down by *vicecomes non misit breve*, which cannot be done in the case of a writ of error. But in a modern case^p, where it appeared that the whole delay had arisen on the part of the defendants, by bills in Chancery for injunctions, and by obtaining time for payment, &c. the court were unanimous, that this rule, of reviving a judgment above a year old by *scire facias*, before execution, which was intended to prevent a surprise upon the defendant, ought not to be taken advantage of by one, who was so far from being surprised by the delay, that he himself had been trying all manner of methods, whereby he might delay the plaintiff;

^o 6 Mod. 288. 1 Salk. ^p 2 Bur. 660.
322. S. C. 1 Str. 301. S. P.

and

and therefore they discharged the rule for setting aside the execution, with costs.

Where there is any change or alteration of parties, a *scire facias* is in general necessary, to warrant an execution; as in case of death^a, &c. Where there are two or more plaintiffs or defendants, in a personal action, and one of them dies before judgment, his death should regularly be suggested on the roll, and judgment entered for or against the survivors. But where one of two plaintiffs died before interlocutory judgment, and the suit notwithstanding went on to execution in the name of both; on a motion to set aside the proceedings for this irregularity, the court permitted the plaintiff to suggest the death of the other, before interlocutory judgment, on the roll, and to amend the *capias ad satisfaciendum*, without paying costs^r. And where one of several plaintiffs or defendants dies after judgment, execution may be had for or against the survivors, without a *scire facias*^s; but the execution in such case should be taken out, in the joint names of all the plaintiffs or

^a 2 Ld. Raym. 768.

Raym. 244. 1 Salk. 319.

^r 5 T. R. 577.

Carth. 404. Comb. 441.

^s Moor, 367. Noy, 150.

5 Mod. 330. 1 Show. 402.

Carth. 112, 193.

1 Ld.

S. C. 7 Mod. 68. S. P.

defendants, otherwise it will not be warranted by the judgment¹.

Where several actions are brought against different parties, for the same debt, as upon a bail bond, promissory note, or bill of exchange, each party is liable to an execution for the whole debt, and the costs of the action against himself; but neither of them is liable to the costs of the actions, against the other defendants². And, in actions upon a bail-bond, it is usual to apportion the debt and costs in the original action, amongst the different defendants, and to sue out execution against each for a part, together with his own costs.

In an action of *debt* on bond for a penalty, the sheriff may be directed to levy the sum secured by the condition, together with the damages and costs recovered by the judgment, and all subsequent costs of the execution, &c.; but in other actions, he can only levy the sum recovered by the judgment.

There are three different kinds of execution, first, by *fieri* or *levari facias* against the

¹ 1 Ld. Raym. 244. ² *Ante*, 287, 8.
Salk. 219. S. C.

defendant's

defendant's goods; secondly, by *elegit* against his goods, and a moiety of his lands; and thirdly, by *capias* against his person. These are judicial writs, issuing out of the court where the record is, upon which they are grounded; and therefore when a record is removed here, from a county palatine, or other court, by writ of error, and the plaintiff is nonprossed, this court will award execution^v. So if proceedings are removed out of the county court, or other court not of record, by writ of false judgment, and the plaintiff is nonprossed, the execution shall issue out of the court above^w; but in the latter case, a *scire facias* seems to be necessary^x.

The plaintiff may sue out any one of these writs, in the first instance; and it seems that, before execution, he may abandon one writ, and sue out another of a *different* sort: Or he may have several writs, of the *same* sort, running against the defendant or his goods, at the same time, in different counties. But after the execution of one writ, the plaintiff cannot sue out or proceed upon another, of the same or a different sort, until that which

^v 3 T. R. 657.

^x *Id.* Bro. Brev. Jud. 206,

^w Bro. Abr. tit. *Executions*, 318, 320.

112. tit. *Faux-judgment*, 6.

has been executed is returned ; and then, if a part only be levied upon a *feri facias*, the plaintiff may have an *alias feri facias*, or other execution for the remainder ; or if the *capias ad satisfaciendum* be rendered ineffectual, by the death or escape of the defendant, the plaintiff may have a new writ for the whole : And he may sue out and execute several *elegits*, for lands in different counties.

A *feri* or *levari facias* is a common law execution ; and, except in a county palatine, is directed to the sheriff of the county where the action is laid, commanding him that of the goods and chattels of the defendant, in his bailiwick, he cause to be made or levied the sum recovered, and have it before the king at *Westminster*, or, by original, *wheresoever*, &c. on the return day. In point of form, it invariably pursues the judgment ; and therefore it has been holden, that a special execution is not warranted by a general judgment^v.

This writ should be *tested* in term time^z, on a day after the judgment is, or may be supposed to have been given : And, as the judgment relates in law to the first day of the term wherein it is signed, it seems that the

^v 1 T. R. 80.

^z 2 Salk. 700.

feri facias may be tested on any day in that term^a; and it should be made returnable, in term time, on a day certain by bill, or, by original, on a general return day. If it be tested^b, or returnable^c out of term, or, in an action by bill, if it be returnable on a general return day^d, it is void, or at least erroneous, and may be quashed or set aside on motion, together with the proceedings that have been had under it. A writ of *feri facias* may be amended, by adding or altering the teste or return^e.

At common law, the *feri facias* had relation to its *teste*, and bound the defendant's goods from that time: So that if the defendant had afterwards sold the goods, though *bonâ fide* and for valuable consideration, they were still liable to be taken in execution, into whose hands soever they came^f. This relation, being productive of great mischief to purchasers, was taken away by the statute 29 Car. II. c. 3. § 16. which enacts "that no

^a 1 Crompt. 372.

^b 2 Salk. 700.

^c *Davey v. Hollingsworth*,
and another, T. 24 Geo.
III. K. B.

^d 1 Willf. 155.

^e Say. Rep. 12. *Davey* 174.

v. Hollingsworth and another, *ante*.

^f Gilb. Exec. 13, 14. 8
Co. 171. Cro. Eliz. 174,
440. Cro. Car. 149. 2
Vent. 218. but see 1 Lev.

" writ

Of Execution.

“ writ of *feri facias*, or other writ of execution, shall bind the property of the goods, against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and for the better manifestation of the said time, the sheriff, under-sheriff and coroners, their deputies and agents, shall upon the receipt of any such writ, (without fee for doing the same) indorse upon the back thereof, the day of the month or year whereon he or they received the same.” But neither before this statute, nor since, is the property of goods *altered*, but continues in the defendant, till execution executed. The meaning of these words, *that no writ of execution shall bind the property, but from the delivery of the writ to the sheriff*, is, that after the writ is so delivered, if the defendant make an assignment of his goods, unless in market overt, the sheriff may take them in execution ^g.

This statute, being made in favor of purchasers, does not alter the law as between the parties: therefore, if the execution be tested in the defendant's life-time, it may be taken out ^h,

^g 2 Eq. Caf. Abr. 381. Raym. 850, 7 Mod. 95. and see 1 Ld. Raym. 252. S. C.

^h 12 Mod. 5. 2 Ld.

and executedⁱ, after his death. And the sheriff deriving his authority from the writ, it has been holden, that if the plaintiff die, after a *feri facias* sued out, it may be executed notwithstanding; and his executor or administrator shall have the money^k: Or if the plaintiff has made no executor, or administration is not yet committed, the money must be brought into court, and there deposited, until, &c^l.

The king is not bound by this statute^m: Therefore if an extent for the king's debt be tested, before or on the day of delivering the subject's execution to the sheriff, the king's writ shall be preferredⁿ; but if goods be taken in execution on a *feri facias*, against the king's debtor, and before they are sold, an extent issues at the king's suit, grounded on a bond debt, and tested after the delivery of the *feri facias* to the sheriff, these goods cannot be taken upon the extent^o.

ⁱ Gilb. *Exec.* 15, 16. 1073.
 Law of *Exec.* 46. Cro. Eliz. ^m 3 Atk. 739. 1 Vez.
 181. 1 Mod. 188. Comb. 196.
 33. Pr. Reg. 215. ⁿ 9 Co. 129. b.
^k Cro. Car. 459. 1 Sid. ^o *Uppom v. Sumner*, 2
 29. 2 Ld. Raym. 1073. 1 Blac. Rep. 1251, 1296. 4
 Salk. 322. S. C. T. R. 402.
^l Noy, 73. 2 Ld. Raym.

As between different plaintiffs, if two writs of execution are delivered to the sheriff on the same day, he ought to execute that first, which was first delivered^p, except it be fraudulent, and then he ought to execute the other^q; and the court on motion will not assist the plaintiff in the second execution^r. But if the sheriff levies goods in execution, by virtue of the writ last delivered, and makes sale of them, whether the last writ was delivered upon the same, or a subsequent day, the property of the goods is bound by the sale, and the party cannot seize them by virtue of his execution first delivered; but he may have his remedy against the sheriff^s.

By this writ, the sheriff has authority to seize and sell every thing that is a chattel, belonging to the defendant^t, except his necessary wearing apparel. It has even been holden, that if the defendant have two gowns, the sheriff may sell one of them^u. And he may sell leases or terms for years, and *fructus industriales*, as corn growing, which goes to the ex-

^p 1 T. R. 729.

bott v. Peckham, 1 T. R.

^q 1 Will. 44.

731. *in notis*.

^r 1 T. R. 729.

^s *Gilb. Exec.* 19. 3 Co.

^t 1 Ld. Raym. 252. 1 12.

Salk. 320. *Carth.* 419. *S.*

^u *Comb.* 356.

C. and see the case of *Ry-*

ecutor;

ecutor; but furnaces, or apples upon trees, which belong to the freehold, and go to the heir, cannot be sold by the sheriff on this writ ^v. Money in the sheriffs' hands, belonging to the defendant, may be taken in execution ^w. But the sheriff cannot take goods pawned, or gaged for debt; nor goods demised or letten for years, nor goods distrained ^x.

In assigning a term for years, it is not necessary for the sheriff to state, in the assignment, the particular interest which the defendant has, for he may not be able to come at the precise knowledge of it; but it is sufficient for him to state, that the defendant is possessed of the premises, for a term of years, *yet to come and unexpired*, and to assign all his interest therein generally ^y; and it is more prudent in the sheriff to state the interest in this way, for if he attempt to state it particularly and fail, the vendee will not have a good title ^z. It is said, that if a sheriff, on a *fieri facias*, sell a lease or term of an house, he cannot legally put the party out of possession, and the vendee in; but the vendee must bring

^v Gilb. Exec. 19.

^y 4 Co. 74. Cro. Eliz.

^w Doug. 219.

584. S. C.

^x Bac. Abr. tit. Exec. 352.

^z *Id. ibid.* 3 T. R. 294.

his ejectment^a. This however must be understood of a *forcible* expulsion; for it has been determined, that under a *feri facias*, the sheriff may justify expelling the defendant *peaceably*^b, or, in other words, if the defendant will consent to go out, the sheriff may put the vendee in possession. If the defendant, subsequent to the delivery of the writ to the sheriff, make an assignment of a leasehold estate, the judgment creditor need not bring a suit in equity to come at the estate, by setting aside the assignment; but may proceed at law to sell the term, and the vendee, who is generally a friend of the plaintiff, will be intitled at law to the possession, notwithstanding such assignment^c. Where the defendant has only an equity of redemption, in a leasehold estate, it seems that an execution will not affect it, as the legal estate is in the mortgagee^d: The plaintiff's only remedy in that case, is by filing a bill in equity, to redeem the estate, by paying off the principal and interest due on the mortgage^d.

The sheriff, upon this writ, may take any goods, which have been fraudulently sold or conveyed away by the defendant; and a prin-

^a 2 Show. 85.

^b 3 T. R. 292.

^c 3 Ark. 739.

^d *Id. ibid.*

incipal badge of fraud is the defendant's continuing in possession : For if a man sell goods, and still continue in possession, as visible owner of them, such sale is fraudulent and void as against creditors^f. So, if a creditor by *feri facias* seize the goods of the debtor, and suffer them to remain long in the debtor's hands, and another creditor obtain a subsequent judgment and execution ; it has been determined often, that this is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain liable^g. So, where it was proved, in an action for a false return, that the warrant upon a *feri facias* was directed to three persons, as special bailiffs ; that the plaintiff's attorney was present at the time of executing it, and ordered one of the persons to use the defendant kindly, and not to take any of his household goods, for that his landlord would soon be in the country, and pay the debt ; and thereupon another of the persons rode round the farm and grounds, and said, "*I seize all this corn and cattle,*" and took some account thereof, for the use of the plaintiff ; afterwards,

^c Gilb. Exec. 15. and see
Twyne's case, 3 Co. 81.
Godb. 161.

^f Prec. in Chan. 286, 7.

^g Id. *ibid.* 1 Vez. 245,
456.

the landlord sued out a *feri facias*, and the sheriff's bailiffs not being in possession of the goods, under the former writ, nor having left any body for them, he got his execution executed; and there was no proof, that he promised to pay the plaintiff; it was left to the jury, upon this evidence, whether the first execution was intended to be, or was really executed; and the jury thought it was not, and gave a verdict for the sheriff, which was afterwards confirmed by the court, on a motion for a new trial^h. But if the defendant sell his goods *bonâ fide*, and for a valuable consideration, before the delivery of the writ to the sheriff, they cannot be taken in execution; and though he sell them fraudulently, yet if they be afterwards sold to another *bonâ fide*, they are not liable to be taken in the hands of the second vendeeⁱ.

In an action against *Partners*, the sheriff must seize all their joint property, because the moieties are undivided; for if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety

^h 1 Will. 44.

ⁱ Godb. 161.

thereof

thereof undivided, and the vendee will be tenant in common with the other partner ;.

On a *feri facias*, the sheriff is bound at his peril to take only the goods of the defendant ; and therefore, if he take the goods of a third person, though the plaintiff assure him they are the defendant's, he is a trespasser ; for he is obliged at his peril to take notice whose the goods are. And if he doubt, whether the goods shewn him are the defendant's, he may summon a jury, *de bene esse*, to satisfy himself * : This will justify the sheriff in returning, if it be so found, that the defendant has no goods within his bailiwick ; or if it be found that he has, will mitigate damages in an action of trespass, provided the goods should afterwards turn out not to be the defendant's.

As the sheriff cannot take the goods of a third person, so if the defendant become bankrupt, before the delivery of the writ to the sheriff, or, as it should seem, before it is actually executed ¹, the sheriff cannot legally take or dispose of them, after notice of the act of bankruptcy, and of a commission sued

; 1 Salk. 392. and see 2 * Gilb. Exec. 21. Bac. Ld. Raym. 871. Comb. Abr. tit. Exec. 352. 4 T. R. 217. Com. Rep. 277. 621, &c. Cowp. 449. Doug. 627. ¹ 1 Lev. 173, 4.

out or docket struck : For *Per Holt*, Ch. J. if a writ of execution be delivered to the sheriff against *A.* who becomes bankrupt before it is executed, the execution is superseded; consequently, the property of the goods is not absolutely bound, by the delivery of the writ to the sheriff^m. But if the sheriff seize and sell the goods, before he has notice of an act of bankruptcy, &c. he is excusedⁿ; and if he sell them after such notice, though he may be sued in *trover*^o, yet he is not liable to an action of *trespass*^p. An execution against the goods of a bankrupt, taken out after his certificate is signed, but before it is allowed, is valid^q: And where a defendant was taken in execution, under similar circumstances, and paid the debt and costs to the sheriff, the court on application refused to relieve him^r.

In an action against a *husband*, goods cannot be taken in execution, on a *feri facias*, if vested in *trustees* before marriage, for the

^m 1 Ld. Raym. 252. and ^p 1 T. R. 475.
 see 2 Eq. Caf. Abr. 381. ^q 1 T. R. 361. and see 1
ⁿ 1 Blac. Rep. 205. ² Blac. Rep. 400.
 Blac. Rep. 829. S. P. ^r *Neatly* and *Eagleton*,
^o 1 Burr. 20. ¹ Blac. E. 24 Geo. III. K. B.
 Rep. 65. S. C.

benefit of the *wife*¹. And in an action against an *executor*, for his own debt, the goods of the testator, in the hands of the defendant, cannot be taken in execution². If the action be brought for the debt of the testator, the judgment is usually for the debt or damages and costs, to be levied of the goods and chattels of the testator, in the hands of the defendant, if he hath so much thereof in his hands to be administered, and if he hath not, then the costs to be levied of his own proper goods: In such case, the method is, for the plaintiff to sue out a *fieri facias de bonis testatoris si, et si non, de bonis propriis*, according to the judgment³; upon which, the sheriff either returns *nulla bona* generally, or *nulla bona* and a *devastavit* by the defendant⁴. On the former return, the plaintiff must proceed by *scire fieri* inquiry⁵, or action of debt upon the judgment, suggesting a *devastavit*: on the latter, he may have execution immediately against the defendant, by *capias ad satisfaciendum*, or *fieri facias de bonis propriis*⁶.

¹ Cowp. 432. 3 T. R. 618. but see 2 Vern. 239. ² *Thef. Brev.* 116, 17.
³ 4 T. R. 621. ⁴ Lil. Ent. 664.
⁵ Cro. Eliz. 886, ⁶ *Thef. Brev.* 46, 7. 122, 125.

The sheriff, upon a *feri facias*, cannot justify breaking open the *outer* door of a dwelling-house^y; but, if that be open, he may break open an inner door^z: And as goods may be distrained, so it seems they may be taken in execution, through the windows, if open^a. When the officers are once in the house, they may break open any chamber doors, or trunks, for executing the writ^b. A seizure of part of the goods in a house, by virtue of a *feri facias*, in the name of the whole, is a good seizure of all^c: And the sheriff, by the seizure, has such a property in the goods, that he may maintain *trespass* or *trover*, against the defendant or a third person, for taking them away^d. And he may sell them after the return of the writ, and even after he is out of office, without a *venditioni exponas*^e.

But, before the removal of the goods, the sheriff should take care, that the landlord is satisfied what is due to him, from the tenant of the premises on which the goods are taken,

^y 18 Ed. IV. 4. pl. 19.

^z 5 Co. 93. Gilb. *Exec.* 17,

18. Cowp. 1.

^a Comb. 17.

^b 1 Rol. Abr. 671.

^c 2 Show. 87.

^e 1 Ld. Raym. 725.

^d Gilb. *Exec.* 15. 2

Saund. 47. 2 Ld. Raym. 1073.

^e Cro. Jac. 73 Yelv. 44.

S. C. 1 Vez. 196.

not exceeding a year's rent. For, by the statute 8 *Ann.* c. 14. § 1. "no goods or chattels
" whatsoever, lying or being in or upon any
" messuage, lands or tenements, which are or
" shall be leased for life or lives, term of
" years, at will, or otherwise, shall be liable
" to be taken, by virtue of any execution, on
" any pretence whatsoever, unless the party, at
" whose suit the said execution is sued out,
" shall, before the removal of such goods
" from off the said premises, by virtue of
" such execution or extent, pay to the land-
" lord of the said premises, or his bailiff, all
" such sum or sums of money, as are or shall
" be due for rent for the said premises, at the
" time of the taking such goods or chattels, by
" virtue of such execution, provided the said ar-
" rears of rent do not amount to more than one
" year's rent; and in case the said arrears shall
" exceed one year's rent, then the said party, at
" whose suit such execution is sued out, pay-
" ing the said landlord, or his bailiff, one year's
" rent, may proceed to execute his judgment,
" as he might have done before the making of
" this act; and the sheriff, or other officer, is
" hereby impowered and required to levy,
" and pay to the plaintiff, as well the money
" so paid for rent, as the execution money."

“ Provided always, that nothing in this act
 “ contained shall extend, or be construed to ex-
 “ tend, to let, hinder or prejudice her majesty,
 “ her heirs or successors, in the levying, reco-
 “ vering, or seizing any debts, fines, penalties
 “ or forfeitures, that are or shall be due,
 “ payable or answerable to her said ma-
 “ jesty ^f, &c.”

This statute extends to all manner of ex-
 ecutions, for the defendant as well as the
 plaintiff^g; and the landlord is intitled to his
 whole rent, without deduction of poundage^h.
 But after he has had one year's rent paid him,
 he is not intitled to another, upon a second
 executionⁱ; and the ground landlord is not
 within the act, where there is an execution
 against the under-lessee^k. A commission of
 bankrupt is not considered as an execution
 within this statute; and as the landlord, on
 the one hand, may distrain for his whole rent,
 even after an assignment and sale by the
 assignees, before the goods are removed off
 the premises, so, on the other hand, if he
 suffer the goods to be removed, without dis-
 training, he must come in for his rent *pro*

^f § 8.

^g 2 Will. 140.

^h 1 Str. 643.

ⁱ 2 Str. 1034.

^k 2 Str. 789.

ratâ with the other creditors¹. If the sheriff remove the goods, without satisfying the landlord, he is liable to an action, which may be brought by the executor or administrator of the landlord^m; but in order to maintain an action, there must be a demand made of the rent, before the goods are removedⁿ: Or, instead of bringing an action, the landlord may move the court, that he may be paid what is due to him, out of the money levied, if sufficient for the purpose, or otherwise so much as it will satisfy^o.

On the return day of the *feri facias*, the sheriff may be called upon, by rule, to return the writ; and if he do not return it, or offer a reasonable excuse, the court will grant an attachment against him. But if the property of the goods be disputed, which frequently happens on a commission of bankrupt, &c. he may apply for time to make his return, on bringing the money into court, and that the proceedings against him may be stayed, 'till the right be tried between the contending

¹ 1 Atk. 103, 4.

^o 2 Willf. 140. 1 Crompt.

^m 1 Str. 212.

381.

ⁿ *Id.* 97.

parties, or one of them has given him a sufficient indemnity.

The returns commonly made by the sheriff to a *feri facias* are, first, *nulla bona*, which is either general, that the defendant has no goods in his bailiwick, whereof he can cause to be made the sum directed to be levied, or any part thereof; or special, with this addition, that the defendant is a beneficed clerk, having no lay fee within his bailiwick: secondly, *feri feci*, or that the sheriff has caused to be made, of the defendant's goods, the whole or a part of the money, which he has ready to be paid to the plaintiff: thirdly, that he has taken goods of the defendant, to a certain amount, which remain in his hands for want of buyers.

If the sheriff return, on a *feri facias*, that the defendant has no goods in his bailiwick, the plaintiff, if it be true, may have an *alias feri facias*, and after that, if necessary, a *pluries* into the same county; or he may have a *testatum feri facias* into a different county, suggesting that the defendant has goods there: And a *testatum* may be awarded into *Wales*, or a county *palatine*^p. But if it be not true,

^p Cro. Jac. 484. and see 1 206. 2 Saund. 193.
Ilev. 256, 291. T. Raym.

the plaintiff may maintain an action against the sheriff for a false return. And where the sheriff returns *nulla bona*, and there is a recovery against him for his false return, that vests no property of the goods in him; but they remain in the party, and are liable to any subsequent execution for his debt^a.

The plaintiff cannot regularly sue out a *feri facias*, into a different county from that where the action is laid, without a *testatum*^r; nor a *testatum*, without a previous *feri facias*^s. But the award of a *testatum*, on the roll, is sufficient to warrant a *feri facias*, into a different county^t; or, if a *feri facias* be sued out into one county, when it should have been a *testatum*, without any original *feri facias*, and the plaintiff afterwards sue out an original *feri facias*, the court will permit the party to amend the former, on payment of costs^u; and they will not set aside a *testatum*, sued out without an original *feri facias* to warrant it, if the plaintiff afterwards sue out such original *feri facias*, and get it returned and filed, so as to be able to produce it on

^a 2 Vern. 239.

^s 3 T. R. 388.

^r 2 Blac. Rep. 694. *Pal-*
ter and *Ellison*, Hil. 25 Geo.

^t Barnes, 196, 7. and see
Prac. Reg. 210, 12.

III. K. B. 3 T. R. 657.

^u 3 T. R. 657.

shewing

shewing cause ^v, though a writ of error has been previously brought ^w. And it is said, that the *feri facias*, on which the *testatum* is founded, is returned of course by the attornies themselves, as originals are ^x. In all continued writs, the *alias* or *testatum* must be tested, the day the former was returnable ^y; and if a *feri facias* issue to the sheriff, returnable on a general return day, and he at that day return *nulla bona*, a *testatum fieri facias* may issue on the day following, and execution thereon will be good: for though, on mesne process, there can be no *testatum*, till the *quarto die post*, yet it is otherwise in writs of execution, for on these the party has no day in court ^z.

If the sheriff return *nulla bona*, and that the defendant is a beneficed clerk, having no lay fee, there goes a *levari facias* to the bishop of the diocese wherein the benefice is, commanding him to levy the sum recovered, of the *ecclesiastical* goods and chattels of the defendant ^a. This writ is similar to a *feri facias*;

^v 2 Salk. 589, 90. Barnes,
200, 201, 8, 9, 11. 3 T.
R. 388, 657.

^w 5 T. R. 272.

^x 2 Salk. 590.

^y *Id.* 699.

^z T. Jon. 200.

^a Gilb. *Exec.* 26. Bac.
Abr. tit. *Exec.* 360.

and the bishop, who is in nature of a temporal officer, or ecclesiastical sheriff, may seize and sell the profits of the benefice^b: but he must return *feri feci*, and not *sequestrari feci*, upon this writ^c. He may also, like the sheriff, be called on by rule to return the writ; and if he make a false return, will be liable to an action^d. Upon this writ, the bishop or his officer makes out a sequestration, directed to the churchwardens, or, upon a proper security, to persons of the plaintiff's own appointment, requiring them to sequester the tythes, and other profits of the benefice^e; which sequestration should be forthwith duly published, by reading it in church during divine service, and afterwards at the church door, and fixing a copy thereon; for where a sequestration was made out, and not published while the writ was in force, but was stayed in the register's hands, by desire of the plaintiff's attorney, the court held, that it had no priority, as against other sequestrations, afterwards made out and duly published; but that if it had been published, the execution would

^b 2 Mod. 257, 8.

265. S. C.

^c 1 Str. 87.

^e Burn, *Eccles. Law*, tit.

^d Gilb. *Exec.* 26. and see *Sequestration*, 3 V. 317.

¹ Salk. 320. 1 Ld. Raym.

have

have taken effect, and must have been first satisfied, notwithstanding it was then returnable ^f. It is said, that this writ of sequestration must be renewed every term ^g: But it seems, that if the writ be laid and executed, before the day of the return, the mesne profits may be taken under it, after the writ is returnable, otherwise not ^h.

If *feri feci* be returned, the plaintiff may proceed against the sheriff for the money, by rule of court, or action of *debt* founded on his return; or, though no return be made, an action of *debt*, *account* or *assumpsit*, will still lie against the sheriff, or his executors, for the money levied ⁱ. And in such an action, the defendant cannot plead the statute of limitations; for though, till the writ be returned, it is not a matter of record, yet it is founded upon a record, and has a strong relation to it ^k. If, on a *feri facias*, all the money is not levied, the writ must be returned before a second execution can be taken out; for that must be grounded on the first writ, and recite

^f *Leggische v. Bishop of Sequestration*, 3 V. 317.
Exeter, E. 22 Geo. III. K. ⁱ Cro. Car. 539. 2 Show.
 B. 1 Crompt. 359. 79, 281. Gilb. Exec. 25.

^g 1 Crompt. 345.

^k 2 Show. 79.

^h Burn, *Eccles. Law*, tit.

that

that all the money was not levied thereon ; but if upon the first, all the money had been levied, the writ need not have been returned, for no further process was necessary ¹.

If the sheriff return, that he has taken goods, which remain in his hands for want of buyers, the plaintiff may sue out a writ of *venditioni exponas*, reciting the former writ and return, and commanding the sheriff to expose the goods to sale, and have the monies arising therefrom in court, at the return of it. If goods are not taken to the value of the whole, the plaintiff may have a *venditioni exponas* for part, and a *fieri facias* for the residue, in the same writ ^m; and it seems, that a *venditioni exponas* may be directed to the new sheriff, where the old one returns, that he has taken goods, which remain in his hands for want of buyers ⁿ. But the more usual way of proceeding, in such case, is by writ of *distringas* to the new sheriff, commanding him to distrain the old one, till he sell the goods, &c. Of this writ there are two sorts; the first, which is the more ancient, commands the sheriff, to whom it is directed, to distrain the

¹ 2 Salk. 318. Gilb. Exec.

^m Thes. Brev. 305.

26.

ⁿ 2 Saund. 343.

late sheriff, so that he expose the goods to sale^o, and cause the monies arising therefrom to be delivered to the present sheriff, in order that such sheriff may have those monies in court, at the return^p. The other writ, which is the most usual^q, is to distrain the late sheriff, to sell the goods, and have the money in court himself^r.

If the writ of *feri facias*, &c. be irregular, the defendant may move the court to set it aside, and that the goods or money levied may be restored to him. A third person, whose goods are taken under it, may also move the court, to have them restored. But if the right be not clear, the court will leave him to his action against the sheriff; or they will sometimes direct an issue for trying it, and retain the money in court, to abide the event of the trial.

Upon an *erroneous* judgment, if there be a regular writ, the party may justify under it, till the judgment is reversed; for an erroneous judgment is the act of the court^s: And the party need not set forth in his plea, that

^o Gilb. Exec. 21.

^p 34 Hen. VI. 36.

^q 6 Mod. 299.

^r Rast. 164. *Thef. Brev.*

90. *Off. Brev.* 45. 2 Ld.

Raym. 1074. 5. 1 Salk. 323.

S. C.

1 Str. 509.

the writ has been returned. But if the judgment or execution be *irregular*, the party cannot justify under it, for that is a matter in the privity of himself or his attorney: And if the sheriff or officer, in such case, join in the same plea with the party, he forfeits the benefit of his defence^t. The sheriff or officer however may justify under an *irregular* judgment, as well as an *erroneous* one; for they are not privy to the irregularity: And, so as the writ be not void, it is a good justification, however irregular, and the purchaser will gain a title under the sheriff; for it would be very hard, if it should be at the peril of the purchaser, under a *feri facias*, whether the proceedings were regular or not^u. But a justification by the sheriff or officer, under a returnable process, is ill without shewing a return of it; and if the plaintiff join with the officer, there must be judgment against both^v. Where the plaintiff has execution, and the money is levied and paid, and the judgment is afterwards reversed, there, because it appears on the record that the money is paid, the party shall have restitution without a *scire facias*, and there is a certainty of what was lost; otherwise

^t 1 Str. 509.

^v 2 Str. 1184.

^u 1 Vez. 195.

where it was levied, but not paid, for then there must be a *scire facias*, suggesting the matter of fact, viz. the sum levied, &c. But where judgment is set aside after execution for irregularity, there needs no *scire facias* for restitution, but an attachment shall be granted upon the rule for contempt, if there be not a restitution *.

When the sheriff has taken goods upon a *feri facias*, to the amount of the sum directed to be levied, the defendant is discharged, and may plead it in bar to an action of *debt*, or *scire facias*, upon the judgment *: But where two persons are jointly and severally bound, and execution is had against one of them, and his goods are seized, but not sold, this cannot be pleaded in an action of *debt* against the other obligor; because it is no actual satisfaction †.

After a *feri facias*, if the plaintiff be not satisfied, he may have an *elegit* against the goods of the defendant, and a moiety of his lands, or a *capias ad satisfaciendum* against his

* 2 Salk. 588.

Salk. 322. S. C.

† 2 Ld. Raym. 1072. 1 † *Id. ibid.* 2 Show. 394.

person,

person; or he may sue out either of these writs in the first instance.

An *elegit* is founded on the statute *Westm.* 2. (13 *Edw.* I.) c. 18. by which it is enacted, "that when a debt is recovered or acknowledged in the king's court, or damages awarded, it shall be in the *election* of him who sues for such debt or damages, to have a writ to the sheriff, for levying the debt of the lands and chattels, or that the sheriff deliver to him all the chattels of the debtor, (except his oxen, and beasts of the plough) and a moiety of his land, until the debt be levied, by a reasonable price or extent; and if he be evicted, he shall recover by writ of *novel disseisin*, and afterwards by writ of *re-disseisin*, if there be occasion." The writ, we are now speaking of, lies against peers of the realm, as well as others; and also against executors and administrators, upon a *devastavit* returned²: but it lies not against an heir, till his full age; and therefore, on a *scire facias* brought against him, the *parol* shall demur, because he may have a good plea to bar the execution, which might be mispleaded³. This writ may be sued out after a year, without a *scire facias*, upon awarding an *elegit* on

² 1 *Crompt.* 346.

³ *Gilb. Exec.* 58.

the roll, and continuing it down by *vicecomes non misit breve*^b; and the plaintiff may have *elegits* awarded into as many different counties as he pleases, without being under the necessity of suing out *testatums*^c. But it is said, that if he award an *elegit* into one county, and extend the lands upon that writ, and afterwards file it, he is barred, and cannot sue out an *elegit* into another county^d.

Upon this writ, the sheriff is to impanel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and also to inquire as to his lands and tenements^e. The goods and chattels being appraised, are to be delivered to the plaintiff, at the price set upon them^f; and in this respect, an *elegit* differs from a *feri facias*, upon which the sheriff cannot deliver the goods, though he may sell them, to the plaintiff^g. If the goods and chattels are sufficient to satisfy the plaintiff's demand, the sheriff ought not to extend the lands^h, but otherwise he may extend them: And he may not only ex-

^b Carth. 283.^c Bac. Abr. tit. *Exec.* 349.^e 1 Crompt. 346, 352.^f Gilb. *Exec.* 33.Law of *Exec.* 208.^g 1 Ld. Raym. 346. Bac.^d 1 Crompt. 346, 352.Abr. tit. *Exec.* 352.Law of *Exec.* 287. but see^h 1 Crompt. 346. 2 Inst.Gilb. *Exec.* 53.

395.

tend a moiety of the lands, properly so called, but also of a reversionⁱ, or rent charge issuing out of land^k; and by the 29 Car. II. c. 3. lands, &c. held in *trust* may be extended, in the hands of trustees, for the debt of *cestui que trust*. But *copyhold* lands are not extendible^l; nor a rent seck^m, advowson in grossⁿ, or glebe belonging to a parsonage or vicarage^o. A term for years may be either extended, or sold as part of the personalty^p: If it be extended, the plaintiff is accountable for all the profits he receives out of the term, upon such extent; and if he receive the debt out of such term, before it expires, the defendant shall be restored to the term itself^q, but otherwise he shall keep the term, and not account for the profits of it^r.

No notice is given of executing an *elegit*^s. And, if there are no lands, the sheriff need not take or return an *inquisition*^t; but otherwise an inquisition must be taken and returned, describing the lands with convenient certain-

ⁱ Gilb. Exec. 38.^o Id. 40.^k Id. 39. Moor, 32.^p 8 Co. 171.^l 1 Rol. Abr. 888. 3^q Gilb. Exec. 35.

Blac. Com. 419.

^r Id. 33.^m Cro. Eliz. 656.^s 1 Cromp. 363.ⁿ Gilb. Exec. 39.^t 2 Str. 874.

ty^u; and after it is taken, the sheriff must deliver a moiety to the plaintiff, by metes and bounds^v: If he do not, the return is ill, and may be quashed for uncertainty^w; and if the defendant be joint-tenant, or tenant in common, it ought to be specially alledged in the return^x. But it has been adjudged, that, upon an *elegit*, the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making in value a moiety of the whole^y: If he deliver more than a moiety, the execution is void^z.

It was formerly usual, for the sheriff to deliver *actual* possession of a moiety of the lands: but he now only delivers *legal* possession, and, in order to obtain actual possession, the plaintiff must proceed by *ejectment*^a; in which he must not only prove the judgment, and, by the judgment-roll, that an *elegit* issued and was returned, but he must also prove the writ of *elegit*, by a true copy thereof, and the inquisition thereon; for it is the *elegit*,

^u Moor, 8. Com. Dig. tit.

^y Doug. 472.

Exec. (C. 14.)

^z 2 Salk. 563, 4. 1 Vent.

^v Dalt. Sher. 135.

259. S. C.

^w Carth. 453.

^a 2 Eq. Cas. Abr. 381.

^x Hut. 16.

3 T. R. 295.

and inquisition upon it, which carve out the term, and give the right of entry, the judgment-roll being no more than a *memorandum*, that the *elegit* issued and was returned ^b.

After an *elegit*, if lands are duly extended, and delivered to the plaintiff, he cannot afterwards have any other species of execution, unless in case of eviction; when he may proceed, in the method pointed out by the statute *Westm. 2.* or, if he be evicted out of all the lands, he may sue out a *scire facias* upon the statute 32 *Hen. VIII. c. 5.* to revive the judgment, and have a new writ of execution, for what remains unsatisfied: But if he be evicted out of part only, or of the whole but for a time, as by a prior judgment, so that the extent is still continuing, there is no remedy by this statute ^c. If the defendant has no lands, and the goods are not sufficient to satisfy the plaintiff, he may have a *capias ad satisfaciendum* after an *elegit* ^d: And a void *elegit* or inquisition, being as none, will not prevent the plaintiff from having a new *elegit*, without a *scire facias*, though it be after the year ^e.

^b Gilb. *Evid.* (by *Leff*) ^d 1 Str. 226. 2 Ld. Raym.
10, 11. Run. *Eject.* 117. 1451. S. C.

^c Gilb. *Exec.* 57, 8.

^e Gilb. *Exec.* 54.

A question having arisen, in the court of Chancery, whether, upon an *elegit*, the plaintiff could be allowed *interest* beyond the penalty of a judgment, Lord *Hardwicke* was of opinion, that at law, upon a judgment entered up, the penalty is the *debitum recuperatum*, and the stated damages between the parties; but if the creditor does not take out an execution against the person of the debtor, or his personal estate, but extends the lands by *elegit*, which the sheriff does only at the annual value, and much below the real, the creditor holds *quousque debitum satisfactum fuerit*, and at law the debtor cannot, upon a writ *ad computandum*, insist upon the creditor's doing more than account for the extended value; but if the debtor comes into a court of equity for relief, this court will give it him, by obliging the creditor to account for the whole that he has received; and as a person who comes for equity must do equity, will direct the debtor to pay interest to the creditor, even though it should exceed the principal: And he said, he remembered very well, upon serjeant *Whitaker's* insisting, before Lord Chancellor *Cowper*, that this would be repealing the statute of *Westminster*, his Lordship said, he would not repeal the statute, but
he

he would do complete justice, by letting the creditor carry on the interest upon his debt, as he was to account for the whole he had received^f.

A *capias ad satisfaciendum* only lay, at common law, in actions of trespass *vi et armis*, but has since been given, in other actions, by a variety of statutes^g; and, where the defendant is at large, it commands the sheriff, or other officer to whom it is directed, to take the defendant, and him safely keep, so that he may have his body in court, on the return day, to satisfy the plaintiff. Where the defendant is already in custody, there is no occasion for this writ; but if the plaintiff would proceed against his body, he must charge him in execution, as directed in a former chapter^h.

This writ lies, after judgment, in every instance where the defendant was subject to a *capias* beforeⁱ; and it may be taken out against the defendant, sued by a wrong name, if he has omitted to take advantage of the

^f 3 Atk. 517, 18. and see
Amb. 520, 1.

^h Chap. 17.

ⁱ 3 Co. 12.

^g Hob. 56.

misnomer^k; but it lies not against Peers or Members of Parliament, except upon a statute-merchant or statute-staple^l, nor against executors or administrators, unless a *devastavit* be returned^m. An infant seems to be liable to this processⁿ; and it may be taken out against bail, without any previous *feri facias*, or return of *nulla bona*^o. In an action against husband and wife, they may both be taken in execution; and the wife shall not be discharged, unless it appear that there is fraud and collusion, between the plaintiff and her husband, to keep her in prison^p.

In point of form, the *capias ad satisfaciendum* must pursue the judgment; therefore, on a judgment against several defendants, it must include them all: And it must be tested and returnable in term-time, in like manner as the *feri facias*^q. In order to charge bail, there ought to be eight days between the teste and return by *bill*^r, and fifteen by *original*^s; but a *capias ad satisfaciendum*, returnable out of

^k 2 Str. 1218.

^p *Id.* 1167, 1237. 1 Wilsf.

^l 1 Crompt. 345.

149. Say. Rep. 149. *Ante*,

^m 3 Blac. Com. 414. 50.

Ante, 751.

^q *Ante*, 726, 7.

ⁿ 2 Str. 1217.

^r 2 Salk. 602.

^o 2 Str. 822, 1139.

^s 13 Car. II. c. 2. § 6.

term,

term, is not void as against the bail, though it may be set aside by the principal, on motion, for irregularity[†]: And there may be an intervening term, between the teste and return of a *capias ad satisfaciendum*^u. If the *capias ad satisfaciendum* be informal, it may be amended, in like manner as the *feri facias*^v.

When the defendant cannot be taken, on the *capias ad satisfaciendum*, the plaintiff may sue out an *alias-capias* into the same, or a *testatum* into a different county; and as the defendant can only be once taken, it seems there may be several writs running against him, at the same time, in different counties: Or instead of suing out an *alias* or *testatum*, the plaintiff may proceed at once to *outlaw* the defendant, by suing out an *exigi facias*, and process of outlawry.

The defendant being taken, upon a *capias ad satisfaciendum*, either remains in custody of the sheriff, who may carry him immediately to the county-gaol^w, or is removed by *habeas corpus* to the King's-Bench prison; where, by the common law, he was to be kept *in salva et arcta custodia*, till he satisfied the

[†] 2 Burr. 1188.

^v 2 Blac. Rep. 836. 2

^u 2 Salk. 700. 2 Ld. T. R. 737. 5 T. R. 557.]

Raym. 775. S. C.

^w 4 T. R. 555.

plaintiff.

plaintiff. The rigor of imprisonment however is now considerably abated, by his being allowed, on giving security, the benefit of the *rules* of the King's-Bench prison, or of living within certain limits^{*} out of its walls; and, in term-time, he is indulged with *day-rules*, or the liberty of going out of the prison, or its rules, for transacting his business. The benefit of the rules of the prison may be had, by one in custody on an *excommunicato capiendo*[†]; but it is never granted to a prisoner in execution on a *criminal* account[‡], or for a contempt[§]: And, by a late rule of court^b, no prisoner in the King's-Bench prison, or within the rules thereof, shall have, or be entitled to have, day rules, above three days in each term; and every such prisoner, having a day rule, shall return within the walls or rules of the said prison, at or before nine o'clock in the evening of the day for which such rule shall be granted.

But the principal benefit which a prisoner is entitled to, is by virtue of the statute 32 Geo. II. c. 28. § 13. (which, originat-

^{*} For the limits of the rules of the King's Bench prison, see R. E. 30 Geo. III. 3 T. R. 583.

[†] 1 Str. 413.

[‡] *Id.* 196. 2 Str. 845.

[§] 2 Str. 817.

^b R. E. 30 Geo. III. 3 T. R. 584.

ing in the House of Lords, is called the *Lords act*). By this statute "if any person
"shall be charged in execution for any sum
"of money not exceeding 100*l*." (since extended to 200*l*. by the 26 *Geo. III.* c. 4. and to 300*l*. by the 33 *Geo. III.* c. 5.) "and shall
"be minded to deliver up to his creditors,
"all his estate and effects, in satisfaction of his
"debts, he may, in order to entitle himself
"to the benefit of the above acts, before the
"end of the first term next after he shall be
"charged in execution, exhibit a petition to
"any court of law, from whence the process
"issued upon which he was taken and charged
"in execution, or to the court into which
"he shall be removed by *habeas corpus* or
"charged in custody; certifying the cause of
"his imprisonment, and setting forth a just
"and true account of all the real and personal
"estate, which he, or any persons in trust
"for him, was or were entitled to, at the
"time of his so petitioning, and also at the
"time of his first imprisonment, and of all
"incumbrances and charges (if any) affecting
"the same, and likewise a just and true
"account of all securities, deeds, evidences,
"writings, &c. concerning the same, and the
"names and places of abode of the witnesses."

The

The humane provisions of the Lords act were rendered as beneficial as possible, by the liberality of the judges, who construed it to extend to prisoners in custody upon an *attachments*, for the non-performance of an award^c, or non-payment of costs^d; which construction has been recognized by the statute 33 Geo. III. c. 5. § 4. whereby, after reciting that persons are often committed on attachments, for not paying money awarded, under submissions to arbitration by,^e or made rules of court, and likewise for not paying costs, duly and regularly taxed and allowed, after proper demands made for that purpose, and also upon writs of *excommunicato capiendo*, or other process for, or grounded on the non-payment of costs or expences, in causes or proceedings in ecclesiastical courts; it is declared and enacted, that “all such persons
“are and shall be entitled to the benefit of
“this act, and subject to the same terms and
“conditions as are therein expressed and de-
“clared, with respect to prisoners for debt
“only.” But the defendant in a *qui tam* action is not entitled to the benefit of the Lords act^e.

^c 1 T. R. 266.^e 3 Bur. 1322. 1 Blac.^d Cowp. 131. 4 T. R. Rep. 372. S. C.

The act requires, that the petition should be exhibited before the end of the *first* term, next after the prisoner is charged in execution. But where a defendant, taken on a *capias ad satisfaciendum*, escaped, and was retaken and committed to the custody of the marshal in a subsequent term, the court held, that he might apply to be discharged, under the Lords act, in the term following^f. And, by the statute 33 Geo. III. c. 5. § 5. “where any debtor shall have neglected to
“take the benefit of the acts, within the time
“limited, and shall make it appear to the
“court, out of which the execution issued,
“that such neglect arose from ignorance or
“mistake, such debtor shall then be entitled
“to take the benefit of the acts, as if he had
“taken the same, within the time so limited
“as aforesaid.” Upon which statute it has been holden, that a prisoner is entitled to the benefit of the acts, who has been prevented from applying for it in due time, by the misconduct of his agent^g.

When a prisoner intends to take the benefit of the Lords act, he must give to, or leave for every creditor at whose suit he is in ex-

^f 4 T. R. 367.

^g *Id.* 231.

ecution,

ecution, or his executors or administrators, and at his or their usual place of abode, or in case they cannot be met with, to or for his or their attorney or agent last employed in the action, a *notice* in writing, signed with his proper name or mark, importing that he intends to petition the court, and setting forth a true copy of the account or schedule he intends to deliver in; which notice must be given *fourteen* days at least before the petition is presented^h: though the judges in one case held, in favour of liberty, that under circumstances, the day of giving the notice might be reckoned as oneⁱ.

After the expiration of the time specified in the notice, the *petition* is to be exhibited, with a certificate annexed, or copy of causes in which the defendant stands charged, obtained from the gaoler, or clerk of the papers, if the defendant is in custody of the marshal^k. An affidavit is also to be made, on unstamped paper, and sworn before a judge in town, or commissioner in the country, of the due service of the notice^l. The petition certificate and affidavit being left with the clerk of the rules, he will draw up a rule for

^h 32 Geo. II. c. 28. § 13.

^k Imp. K. B. 608, 9.

ⁱ 4 Bur. 2525.

^l *Id. ibid.*

bringing

bringing the prisoner into court, and summoning the creditors to appear, personally or by attorney, at some certain day to be therein specified^m; a copy of which rule should be served on each creditor, and also on the gaoler, and an affidavit made of such service.

When the prisoner is charged in execution above twenty miles from *Westminster hall*, or the court out of which the execution issued, the rule requires him to be brought to the next assizes, and that the creditors be summoned to appear there; and a copy of such rule is to be served on every creditor, his executors or administrators, or left at his or their dwelling-house, or usual place of abode, or with his or their attorney, fourteen days at least before the holding of such assizesⁿ.

On bringing up the prisoner, the court or judge of assize are, in a summary way, to examine into the matter of the petition; and after being sworn to the truth of his schedule, if no opposition be made, he is discharged of course, upon executing an assignment and conveyance of his estate and effects, for the benefit of his creditors; which is done by a short indorsement on the back of the petition.

^m 32 Geo. II. c. 23. § 13. ⁿ *Id.* § 15.

But

But in case the persons, at whose suit the prisoner is in execution, are not satisfied with the truth of his oath, and either personally or by attorney desire further time, the court may remand him; and direct the parties to appear on some other day, to be appointed by the court, within the first week of the next term at farthest^o, or sooner if the court shall think fit^p: And the creditors may file *interrogatories* for his examination, before he is admitted to take the benefit of the act^q.

All objections to the insufficiency of the schedule, in point of *form*, must be made the first time the prisoner is brought up^r. And if, at such second day, the creditor shall make default, or shall appear and be unable to discover any estate or effects omitted in the account, the court shall immediately order the prisoner to be discharged, upon his executing an assignment and conveyance of his estate and effects; unless the creditor insist upon his being detained in prison, and shall agree by writing, signed with his name or mark, (or, if he be out of *England*, under the hand of his attorney), to pay and allow the prisoner weekly, a sum not exceeding 2 s. 4 d.

* 32 Geo. II. c. 28. § 13.

^o 33 Geo. III. c. 5 § 5.

^p 3 Bur. 1393.

^r 32 Geo. II. c. 28. § 13.

(which

(which is called the *groats*,) or if more creditors than one insist on his detention, not exceeding 1 s. 6 d. a week each ^s, to be paid on *Monday* in every week, so long as the prisoner shall continue in execution; and in every such case, the prisoner shall be remanded ^t. But if failure be made in payment of the said weekly sums, the prisoner, upon application to the court in term-time, or in vacation to a judge, may, by order of the court or judge, be discharged out of custody, on executing an assignment and conveyance of his estate and effects ^u.

The note or security for payment of the *groats*, must be signed by the plaintiff, if in *England*; and if he be not present in court, must be authenticated by an affidavit of his signature; a note given by the plaintiff's attorney, in such case, not being deemed sufficient^v. The *groats* are payable, by the act, every *Monday*; and if not paid in time, the prisoner has a right to his discharge^w. Where the *groats* were not paid, before ten at night of the day on which they were payable, it was holden that

^s 32 Geo. II. c. 28. § 14. ^v Imp. K. B. 609.

^t *Id.* § 13.

^w Say. Rep. 103. Doug.

^u *Id. ibid.*

67.

the defendant's right to his discharge was not waived, by the turnkey on the felons' side accepting them after that time ^x.

When a defendant is taken in execution, on a *capias ad satisfaciendum*, it is, *quoad* him, considered in law as a satisfaction of the debt ^y. And if the plaintiff afterwards consent to his discharge, though it be on terms which are not afterwards complied with ^z, or upon giving a fresh security, which afterwards becomes ineffectual ^a, the plaintiff cannot resort to the judgment again, or charge the defendant's person in execution. But a *capias ad satisfaciendum* is no actual satisfaction, so as to bar the plaintiff from taking out execution against other persons, liable to the same debt or damages ^b. And, by the 32 Geo. II. c. 28. § 20. "notwithstanding any discharge obtained by virtue of that act, for the person of any prisoner, the judgment obtained against every such prisoner shall continue and remain in force, and execution may at any time be taken out thereon, against the lands, tenements, rents, or hereditaments, goods or chattels of any such prisoner, other than

^x 5 T. R. 36.

^a 1 T. R. 556.

^y Hob. 59.

^b Hob. 59.

^z 4 Bur. 2482.

"and.

“and except the necessary wearing apparel
 “and bedding for himself and family, and
 “the necessary tools for the use of his trade
 “or occupation, not exceeding 10*l.* in value
 “in the whole, as if he had never been be-
 “fore arrested, taken in execution, and re-
 “leased out of prison.” But in order to war-
 rant an execution upon this statute, a *scire*
facias seems to be necessary ^c.

It was formerly holden, that if a person taken on a *capias ad satisfaciendum* died in execution, the plaintiff had no further remedy; because he had determined his choice, by this kind of execution, which, affecting a man's liberty, is esteemed the highest and most rigid in the law ^d. But now, by the statute 21 *Jac.* I. c. 24. reciting, that forasmuch as daily experience doth manifest, that divers persons of sufficiency in real and personal estate, minding to deceive others of their just debts, for which they stood charged in execution, have obstinately and wilfully chosen rather to live and die in prison, than to make any satisfaction according to their abilities; to prevent which deceit, and for the avoiding of such doubts and questions, it is declared, explained and enacted, “that the party or parties at

^c 1 T. R. 80.

^d Hob. 52.

“ whose suit, or to whom any person shall
“ stand charged in execution, for any debt or
“ damages recovered, his or their executors
“ or administrators, may, after the death of
“ the person so charged and dying in execu-
“ tion, lawfully sue forth and have new ex-
“ ecution against the lands and tenements,
“ goods and chattels, or any of them,
“ of the person so deceased, in such manner
“ and form, to all intents and purposes, as he
“ or they or any of them might have had,
“ by the laws and statutes of this realm, if
“ such person so deceased had never been ta-
“ ken or charged in execution.”

“ Provided, that this act shall not extend
“ to give liberty to any person or persons,
“ their executors or administrators, at whose
“ suit or suits any such party shall be and die
“ in execution, to have or take any new ex-
“ ecution, against any lands, tenements or
“ hereditaments of such party so dying in
“ execution, which shall at any time after the
“ said judgment or judgments be by him
“ sold *bonâ fide*, for the payment of any of his
“ creditors, and the money which shall be
“ paid for the lands so sold either paid or se-
“ cured to be paid to any of his creditors,
“ with their privity and consent, in discharge
“ of

“ of his or their due debts, or of some part
“ thereof.”

If a party taken on a *capias ad satisfaciendum*, escape or be rescued, though the sheriff is hereby liable, because he ought to have taken the *posse comitatus*, yet the plaintiff may sue out a new execution; and shall not be compelled to take his remedy against the sheriff, who may be dead or insolvent^c. And if the defendant escape from the King's-Bench or Fleet Prison, the plaintiff, on application to a judge, may have an escape-warrant, in order to retake him, which shall be in force throughout *England*^f.

For executing a writ of *feri facias*, or *capias ad satisfaciendum*, the sheriff is entitled, by the statute 29 *Eliz.* c. 4. to twelve-pence for every 20*s.* when the sum exceedeth not a hundred pounds, and six-pence for every 20*s.* above that sum, that he shall levy or take the body in execution for; which is called his *poundage*. But, by the statute 3 *Geo.* I. c. 15. §17. poundage upon a *capias ad satisfaciendum* shall not be demanded or taken, for any greater sum than the real debt *bonâ fide* due, and marked on the back of the writ. And,

^c 2 *Bac. Abr.* 240, 244, ^f *Stat.* 1 *Ann.* c. 6.

by the same statute^g, the sheriff is entitled, upon executing a writ of *elegit*, to have for poundage twelve-pence for every 20 s. of the yearly value of the lands, whereof possession is given, where the whole exceedeth not the yearly value of a hundred pounds, and six-pence only for every 20 s. *per ann.* above that value. If a sheriff levy under a *feri facias*, he is entitled to poundage, though the parties compromise, before he sells any of the defendant's goods^h; and he is entitled thereto, upon a *capias ad satisfaciendum*, though the defendant go to prison, without satisfying the plaintiffⁱ. For the poundage he is entitled to, the sheriff may maintain an action of *debt* on the statute^k, or he may retain it out of the sum levied; and if the sheriff take more than he is entitled to, he is liable to an action for treble damages, at the suit of the party grieved^l, and shall forfeit 40 l. to the King and the informer^m.

When the judgment is satisfied, by any of the above species of execution or otherwise, the defendant has a right to call on the plain-

^g § 16.

^h 5 T. R. 470.

ⁱ 4 Bur. 1981. Imp. Sher.

145.

^k 1 Salk. 209, 333. 2

Ld. Raym. 1212. S. C.

^l 2 T. R. 148.

^m 29 Eliz. c. 4.

iff, for a warrant or authority, directed to some attorney of the court wherein the judgment is recovered, authorizing such attorney to enter up satisfaction on the judgment-roll; which being obtained, a satisfaction piece is made out, on a slip of unstampt parchment, in the form of a bail-piece, and taken, with the warrant of attorney, to the clerk of the judgments, who will make an entry thereof in his book of remembrances, and deliver it over to the clerk of the treasury, who enters the same on the roll.

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ADDENDA.

A D D E N D A.

THE case of *Lockhart* and others v. *Mackreth*, referred to in p. 310 and 398. is reported in the last number of the Term Reports, K. B. p. 661. And in the same number, which was not published when this work went to press, there are two cases, on the subject of staying proceedings pending error. In the one, of *Levett v. Perry*, p. 669. the court stayed the proceedings, pending a writ of error, on a judgment of nonsuit, contrary to their own former determination, and the practice of the Common Pleas; (*Ante*, 278.) saying, that the practice not to stay proceedings, pending a writ of error, must be confined to those cases, where the party himself, his attorney or bail, declare that the writ of error is brought only for delay. In the other case, of *Masterman v. Grant*, p. 714. it was determined by the court, that they will not stay the proceedings pending a writ of error, if the defendant's attorney has declared, that it was brought for delay, or has used expressions *equivalent* to such a declaration. *Vide ante*, p. 277, 8. 716.

END OF PART II.



ERRATA.

- Page 26. last line but three, for defendant read plaintiff.
39. line 19. for crimes read crime.
46. line 4. for statutes read statute.
67. line 18. dele may.
149. line 7. for c. 13. read c. 19.
192. at the top, for Chap. XIV. read Chap. XV.
329. line 1. for connufance read conufance.
520. line 4. for § 3. read § 8.
524. after Gilb. Evid. in note (a) add p. 5.
528. after Imp. K. B. in note (s) add p. 337.
532. line 4. for The read This.
547. line 16. for on read or.
575. last line but two, for caufe read trial.
661. last line but three, for Hen. VI. read Hen. VII.
663. line 3. for c. 16. read c. 15.
761. line 5. for c. 4. read c. 44.

